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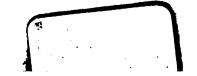
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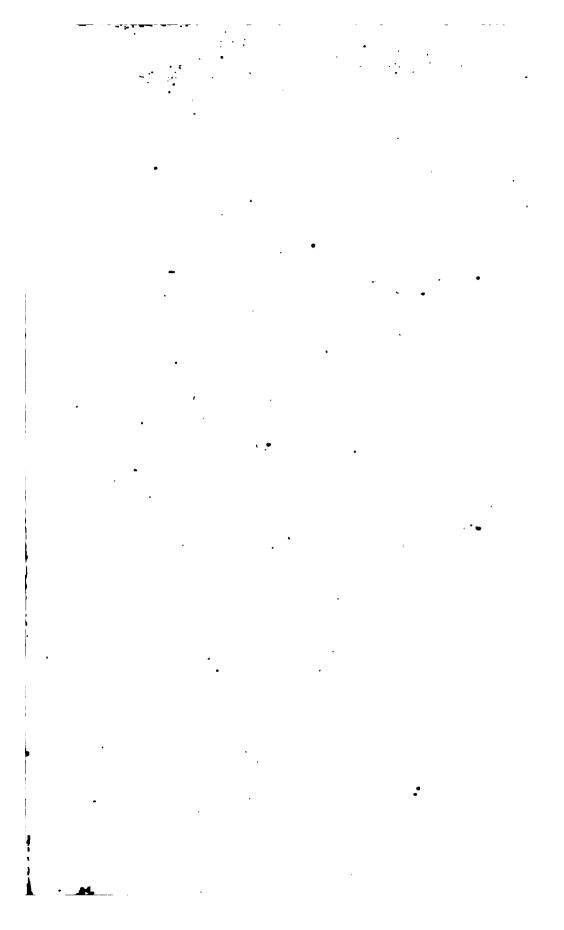
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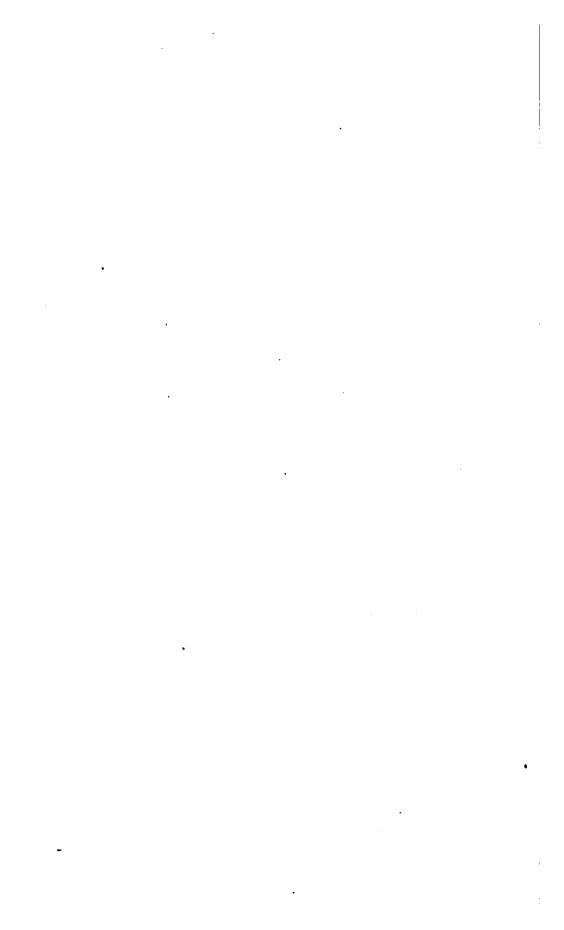
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PLEADING AND PRACTICE

THE HIGH COURT OF CHANCERY,

EDMUND ROBERT DANIELL, F.R.S.

A COMMISSIONER OF THE COURT OF BANKRUFTCY.

Second English Edition:

WITH CONSIDERABLE ALTERATIONS AND ADDITIONS, ADAPTING THE TEXT TO THE LAST GENERAL ORDERS AND THE MOST RECENT DECISIONS OF THE COURT.

BT

THOMAS EMERSON HEADLAM, M.A.

BARRISTER AT LAW.

first American Edition:

TO WHICH ARE ADDED SEVERAL ENTIRELY NEW CHAPTERS, AND COPIOUS NOTES, ADAPTING THE WORK TO

AMERICAN PRACTICE IN CHANCERY,

J. C. PERKINS.

BOSTON:

CHARLES C. LITTLE AND JAMES BROWN.

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TO

CHARLES SUMNER, ESQ.

THIS

first American Edition

DANIELL'S CHANCERY PRACTICE,

IS INSCRIBED,

IN TESTIMONY OF REGARD

FOR HIS

THOROUGH JURIDICAL LEARNING, ACCOMPLISHED SCHOLARSHIP

GENUINE PHILANTHROPY,

BT

J. C. PERKINS.

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PREFACE TO THE AMERICAN EDITION.

This second edition of "Daniell's Chancery Practice" was published in England in detached portions, the last of which reached this country in April, a. d. 1846. The several Parts of the book, as they arrived in this country, have been in the hands of the Editor for the preparation of an American edition, and he has bestowed on the work as much attention and labor as he has supposed it to require.

This treatise of Mr. Daniell combines with *Practice* a very extensive analysis of the rules and principles of *Pleading*.

The subject of Parties is discussed with great fullness and masterly ability.

The rules for framing Bills, Demurrers, Pleas and Answers, are clearly stated and amply illustrated, and the principles of pleading in Equity upon these subjects are very fully developed,

The Rules of Evidence in Equity, and the modes of taking testimony, are discussed at considerable length. The duties of Masters in Chancery, and the practice before them, have a convenient, compact and lucid treatment. And, in fine, every topic pertaining to Pleading and Practice in Chancery, which the author has undertaken to treat of, is discussed with an amplitude, clearness and ability, never before equalled on the

same field of jurisprudence. The student and practitioner will seldom have occasion to refer to any other elementary treatise for the general principles of either Pleading or Practice.

The second English edition has many advantages over the first. Mr. Headlam, the editor of the second edition, as will appear by his Preface, and by an examination of the work, has added several entirely new chapters of great value, for the purpose of completing the work in conformity with the original plan of Mr. Daniell. He has also referred to and stated the later cases on the subject of Practice. Mr. Headlam has likewise made several important alterations in some of the chapters of the original work. Wherever, by so doing, he has omitted any portion of the original work, the American editor has been careful to restore so much of the portions omitted as might be of service here; and thus, while much is gained, nothing is lost to the American Practitioner by these alterations.

The American editor has carefully cited and stated such cases decided in this country as were found illustrative of the principles of Pleading and Practice in Chancery, and has endeavored thereby, as far as he has been able, to give the work a thoroughly American character. He has also added to the work three chapters on important subjects, which were not discussed in the English edition, and will be found in no other edition,—one on Bills of Review; another on Cross-Bills; and the third on Bills of Interpleader;— the last two of which are original.

The Rules of Practice for the Courts of Equity of the

United States, promulgated by the Supreme Court of the United States, January Term, 1842, have been referred to and stated, as far as it was found practicable, and reference has been made to the Rules of Practice in some of the States; but the work could not of course either conveniently or usefully be made to embrace all the rules of local practice, or the statutory regulations of each State.

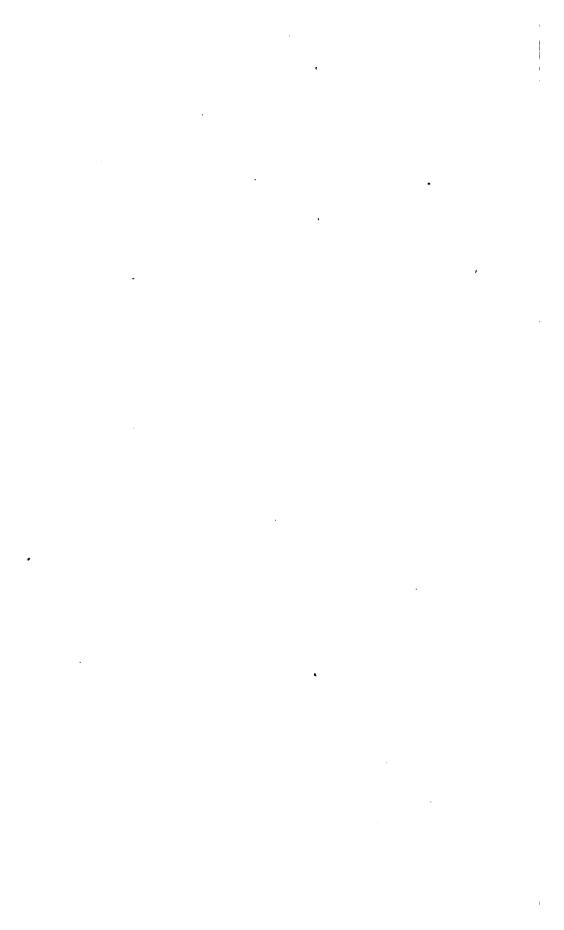
The American editor has very much enlarged the Index, both by more copious reference to the English texts and by reference to his own notes and the subjects discussed in them. The paging has been revised, and the references are believed to be entirely correct.

The work of Mr. Daniell, with Mr. Headlam's additions, could not fail to be extremely useful to the American student and practitioner, even in its English dress; and it is hoped that the notes and additions of the American editor will in some measure increase its value as a book of Practice in this country.

With these observations, the work is submitted to the Profession.

J. C. PERKINS.

Boston, September 16, 1846.



PREFACE.

Whatever apology may be due to the Profession for the manner in which the work has been executed, the Author does not conceive that he is called upon to offer any for the publication of a new Treatise on the Practice of the Court of Chancery. The want of such a Treatise, on a more extended scale than those hitherto published, has long been acknowledged; and the writer feels, that in undertaking one, he is only complying with the wishes of the Profession. Whether the ensuing pages will supply the want which has been felt, is not for him to say; indeed, when he compares what he has accomplished with the previous notions which he had formed in his own mind as to the requisites of a good book of practice, it is with unfeigned diffidence that he commits his work to the Public. He trusts. however, that if he has not performed all that he aimed at, his endeavors to throw light upon this complicated subject will not have proved entirely ineffectual.

The object which the Author has had in view has been to lay before the reader, not merely the abstract rules of practice, collected from the text-books and marginal notes of reports, but to show, as far as could be done, the principles upon which the various rules have been framed, and to point out how far those principles have been followed up in the decisions to be found in the reported cases. He has also endeavored to bring under the eye of the practitioner the several alterations and modifications which have been made, in

the course of proceeding, by the numerous Statutes and Orders of Court which have, of late years, been framed, and to show how far those alterations and modifications are consistent with the ancient practice and the principles by which it was governed. In doing this, he has drawn largely from the excellent work of Lord Chief Baron Gilbert, and from the older text-books and the modern editions of them, as well as from several of the more recent publications. In referring to text-books for information, he has been careful to avoid citing them in any case where the authorities upon which they proceeded were accessible, without a careful inspection and collation of such authorities: and he can venture to assure the Profession that there are few, if any, of the numerous cases cited and referred to in the following Treatise which have not been carefully examined by himself; and that he has also, in every instance in which there has appeared any doubt as to the correctness of the report, made it a rule to refer to the statement of the case in the Registrar's book. sing the modern alterations which have taken place under the new Orders and Statutes, he has not always had the advantage of reported cases for his guidance: he has, however, derived considerable assistance from the Report of the Commissioners, appointed in the year 1824, to inquire into the Practice of the High Court of Chancery, and of the explanatory paper annexed to that document. He has also derived much useful information from the notes and explanations in Mr. Jemmett's edition of Sir Edward Sugden's Acts. same sources, however, have not supplied information as to all the recent Statutes and Orders; and in such cases he has had no alternative but to state the alteration which has taken place without comment, or tooffer the result of his own reasoning and conjectures upon them.

With regard to the "Practical Observations on the Pleadings in the Court," which are incorporated in the following Treatise, the Author owes it to some of his friends, for whose judgment he has the highest respect, to say, that it is contrary to their opinions that he has ventured to introduce them. It must, however, be admitted, that it is extremely difficult in a work of this nature to separate pleading from practice: many points in each are so intimately connected with or arise out of the other, that it is scarcely possible to show the precise line of demarcation; besides which, the writer has himself, in the course of practice, so frequently felt the want of some book which should give him information as to many of the practical points connected with pleading, which every Chancery pleader is supposed to have learnt in the Draftsman's office where he has acquired. his rudiments, and which for that reason are never mentioned in any of the books of practice or publications upon pleading, that he cannot but expect that the incorporation in the following Treatise of such observations upon those points as his own limited experience and the communications of his friends have enabled him to collect, will be as acceptable to the Profession in general, and to the junior branches of it in particular, as it would have been to himself. The same expectation has induced him to make an attempt to reduce into some order the various points and decisions which occur upon the intricate subject of "Parties."

The general plan adopted in the following pages has been (after pointing out the persons by and against whom a suit in Chancery may or may not be instituted, with the peculiarities in point of practice attached to each description of party litigant, and showing who the parties are that must necessarily be brought before the Court in each case,) to trace a suit in equity from its commencement to its termination, detailing all the practical points, whether relating to pleading or to practice, which may arise in every stage of the proceeding. In doing this he has endeavored to discuss fully every point as it occurs, so that each chapter, and each section of every chapter, may set before the reader the whole law upon the subject of which it treats. means he has avoided the necessity of making, perpetually, "prospective references," which frequently occasion confusion, and are always inconvenient to the reader. The course thus pursued may sometimes have led to repetitions; but it is hoped that the instances in which it has done so will not be found very numerous.

There only remains to the writer the agreeable task of returning his sincere thanks to his professional friends for the assistance which he has received from them in the course of his work. He has also to express his gratitude to the Officers of the Court, to whom he has had occasion to apply for information upon points arising within their respective departments, for the readiness with which such information has been communicated. In the Registrar's office, particularly, he has met with attentions, which he is most happy to acknowledge; and he feels that he is adding much to the value of his work when he states that he is indebted to the kindness of Mr. Colville for much useful and valnable information.

EDMUND ROBERT DANIELL.

Lincoln's Inn,
March 6, 1837.

PREFACE BY THE EDITOR.

Upon offering to the Profession this Edition of Mr. Daniell's Treatise on Chancery Practice, I am desirous of stating the reason why more extensive alterations have been made in the text, than are usual when the Second Edition of a standard work is prepared by one, who took no part in the original publication.

I am well aware, that the greater portion of the First Edition has been constantly used by many members of the Profession; and that it has so fully stood the test of experience, as to have created general confidence in the soundness and accuracy of its contents. It would, therefore, have been more satisfactory to me could the responsibility of materially altering the original text have been avoided, as the benefit of that character which Mr. Daniell's Work had gradually acquired would thus have been retained for this Edition. A little consideration, however, will show that such an attempt could not have succeeded.

During the time which has elapsed since the publication of the First Edition, more extensive changes have taken place in the practice of Chancery, than in any other period of similar duration in the annals of

the Court. Not only have numerous and most important Orders been issued, but the increase in the number of the Courts of Equity, and the great attention now bestowed on reporting their decisions, have multiplied the sources from which conclusions of Law, and rules of Practice are ordinarily deduced. These circumstances compelled the introduction of much new matter, and if, in addition thereto, the whole contents of the former Work had been retained, this Edition might, indeed, have exhibited a history of the progress of Chancery Practice, but its size would have prevented its being useful as a book of daily reference.

I have, therefore, throughout, made it my object so to remodel the text, as to render it as nearly as possible what I conceive it would have been, had Mr. Daniell now published it for the first time.

In pursuance of this object, when a more important case than that quoted in the First Edition has since occurred, I have substituted in the text, the recent, for the older authority. In some few instances, also, where it appeared that a subject was treated of at greater length than was due to its importance, the facts of some of the cases have been left out in the text; but whenever this has been done, a reference has been made by Note to the cases so omitted.

In consequence of the changes produced by the recent General Orders, Chapters VII., VIII., IX., XVII., and XIX., of the Original Work, have been almost entirely rejected, and new Chapters have been substituted in their place. Moreover, the arrangement

of the First Edition has been slightly varied by the collection, under the head of Process, of all that is applicable upon the point to defendants of different descriptions.

With respect to the important Orders of May last, no slight difficulty arose from the fact, that they had not come into operation at the time when the greater portion of this work was published, and consequently the text was prepared, and an interpretation put upon them, without the aid of any judicial decisions. plan adopted has been not to publish them continuously in a supplement, but to introduce them wherever the subjects they relate to are discussed, together with an explanation of the manner in which they affect the previous practice of the Court. I have now prefixed a notice of the cases which have subsequently occurred, and directions how they may be inserted in the text, so as to bring down the authorities throughout both volumes to the present time. It may be as well to mention, that whenever any Order has been amended by a subsequent Order, it is quoted as if it had originally issued in its amended form.

When Mr. Daniell, for the reasons stated on the occasion of his last publication, determined not to carry into effect his original plans for the completion of his work, the duty devolved upon me, of supplying what was deemed requisite to make the Treatise such as the Profession had been led to anticipate. With

this view, in addition to some minor points incidentally treated in the progress of the work, I have written separate additional Chapters under the following heads: Chapter xxxiii. on Writs and Orders in the Nature of Injunctions; Chapter xxxvii. on The Payment of Money or Transfer of Stock out of Court; Chapter xxxviii. on The Production of Documents; Chapter xxxix. on Petitions for the Appointment of Guardians and orders of Maintenance; and Chapter xl. on The Statutory Jurisdiction of the Court.

I am aware that there are other subjects which might have been included in the wide range of Chancery Practice; but it was desirable, for many reasons, that the work should be published without any long delay, and I have the satisfaction of knowing that what it now contains includes all that Mr. DANIELL himself considered necessary for its completion. The last Chapter on the Statutory Jurisdiction relates to a subject of daily increasing importance. There has not been, so far as I am aware, any other attempt to treat of it in a connected form. And the fact that the jurisdiction is exercised upon petitions usually unopposed, has prevented the practice concerning it being fully exhibited by reported cases. amongst other reasons, the information I have received from the Registrar's Office has been peculiarly valuable. and I cannot in too strong terms express my sense of the courtesy and readiness to communicate information which I have experienced from the gentlemen in that office. With Mr. Colville and Mr. Rogers, I have been in constant communication; and it is a great pleasure to me to have this opportunity of publicly stating how much I appreciate their kindness and assistance. In conclusion, I have to apologize for not having been able to finish the work in the month of January, the time mentioned in the former publication. The delay has been caused partly by circumstances over which I had no control, and partly by my having been induced to make more extensive additions than I then contemplated.

T. E. HEADLAM.

18th of March, 1846.

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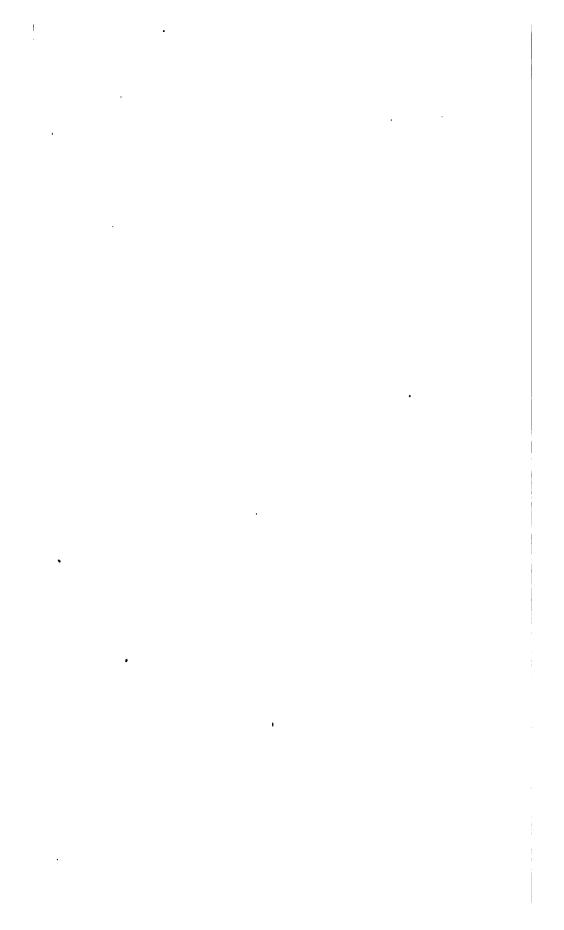
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# PRACTICE

ΛP

# THE HIGH COURT OF CHANCERY.(1)

# CHAPTER I.

### ON THE COMMENCEMENT OF A SUIT.

A surr on the Equity side of the Court of Chancery is com- By English menced by preferring a petition, containing a statement of the bill. plaintiff's case, and praying the relief which he considers himself entitled to receive. This petition, when preferred by a subject, is called in the old books an English Bill, by way of distinction from the proceedings in suits within the ordinary or common-law jurisdiction of the Court, which till the statute of 4 Geo. II. c. 26, were entered and enrolled more anciently in the French or Norman tongue, and afterwards in Latin, and is usually addressed to the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal (a), unless the seals are in the Queen's hands, or the Chancellor himself be the suitor, in which case the bill is addressed to the Queen herself (b) (2).

If the suit is instituted on behalf of the Crown, or of those who By informapartake of its prerogative, or whose rights are under its particular tion. protection, such as the objects of a public charity, the matter of complaint is offered to the Court, not by way of petition, but of information (c), by the proper officer, of the rights which the Crown claims on behalf of itself or others, and of the invasion or detention of those rights for which the suit is instituted (d). This proceeding is then styled an information. The rules of practice

(a) Ld. Red. 7. (b) Ld. Red. 7.

(c) Ld. Red. 7. (d) Ld. Red. 18; 2 West. Symb. 194.

⁽¹⁾ The practice of the English Court of Chancery, and not that of the Exchequer, forms the basis of the Equity practice of the Courts of the United States. Smith v. Burnham, 2 Sumner, 612.

⁽²⁾ Story Eq. Pl. § 7.

By Information.

incidental to these two methods of instituting a suit in Equity differ so little from each other, that in the ensuing Treatise what is said with respect to the one, may be considered as applicable to both, unless where a distinction is specifically pointed out (1).

By Petitions.

There are other methods of commencing proceedings in the Court of Chancery, namely, by petitions, in cases of Infancy, or under particular Acts of Parliament; the Lord Chancellor also exercises a peculiar jurisdiction in Lunacy: but this Treatise has for its object to explain the practice arising out of the ordinary proceedings by bill or information; and in doing this I shall endeavor, first, to trace a suit in all its regular stages, from the bill to the final decree; I shall then proceed to the consideration of the points of practice which arise from incidental occurences, and from interlocutory applications. As a preliminary step, however, I shall first point out the persons by and against whom a suit may be instituted, with the peculiarities of practice applicable to each description of persons; and shall then direct the practitioner's attention to the parties, whom it may be necessary for him to bring before the Court, in order to entitle the plaintiff to obtain the decree which he seeks (2).

(1) Story Eq. Pl. § 8.
(2) In Massachusetts suits in Equity may be commenced by a writ of subpans, according to the usual course of proceedings in Chancery, or the complaint may be inserted like a common declaration, in a writ of original summons, with or without an order for the attachment of the goods and estate of the defendant. The subpans shall be issued from the clerk's office either in term time or vacation, upon a bill there filed. Rev. St. ch. 90, § 117, 118. Had not the Statute provided for a form of process, the bill as used in England in Chancery proceedings, and the proceedings under it as there practiced, would necessarily have been adopted here, for it would be presumed, that the legislature having given jurisdiction, intended it should be exercised according to the most approved forms of that country, which had been the source, from which Massachusetts and other States of the Union had derived their principles and practice in the administration of justice. Commonwealth v. Summer, 5 Pick. 360, 365.

## CHAPTER II.

OF THE PERSONS BY WHOM A SUIT MAY BE INSTITUTED.

## SECTION I. - The Queen's Attorney General (1).

It is a general rule, subject to very few exceptions, that there is All persons no sort or condition of persons who may not sue in the Court of may sue in chancery, and this rule extends from the highest person in the State, to the most distressed pauper.

The Queen herself has the same right which a subject has, to The Queen institute proceedings in her own Courts for the assertion of any right which she claims, either on behalf of herself or others; and the same principles which entitle a subject to the assistance of a Court of Equity, to enable him to assert his legal rights, are equally applicable to the Sovereign. Thus a suit may be instituted on behalf of the Queen to have the benefit of a discovery, from persons charged to be aliens, of the place of their birth, in order to assist her in a commission to inquire into their lands, with the view of seizing them into her hands by inquisition (a). For the same reason, where an office cannot be found for the Crown without the aid of a Court of Equity, the Court will, at the suit of the Crown, interfere to restrain the commission of waste in the mean time (b).

It is said, that the Queen is not bound to assert her rights in _____ may sue any particular Court, but that she may sue in any of her Courts in any Court. which she pleases, without reference to the question, whether the subject-matter of her suit is such as comes within the peculiar jurisdiction of such Court (c). Thus she may have a quare impedit in the Queen's Bench (d), or she may elect to sue either in

⁽a) Attorney-general v. Du Plesais, i Bro. P. C. 415-19. (b) 2 Ves. 286. (c) 11 Rep. 68 B.; Ibid. 75 A.; Plowden, 236, 240, 244. (d) 11 Rep. 68 B.

⁽¹⁾ Rights purely public are to be enforced in the name of the State, or the officer entrusted with the conduct of public suits. Smith v. The Comm. of Butler County, 6 Ohio, 101.

In what Courts.

a Court of Common Law or in a Court of Equity. In a suit which was commenced in Chancery by the Attorney-general on behalf of the King and Lord Hunsdon, as the King's farmer for the manor of West Thoresly and Castleby, in the county of York, against the Duchess Dowager of Arundel and others, a decree was pronounced for the King, although the King had a good title at law, as appears by the report of Sir H. Hobart, who as Lord Chief Baron assisted the Lord Chancellor (e); and in Attorney-general v. Vernon (f), a patent of lands was set aside as unduly obtained. by information in Equity. In both these cases, however, there were equitable grounds alleged for instituting the proceedings. the former case, the cause alleged was, that the deeds whereby the estate came to the party under whose attainder the Crown claimed, were suppressed or withheld by the defendants; in the latter case, fraud and surprise were charged as grounds of relief. seems, however, to be no doubt but that the Queen may proceed in questions relating to the property, to which she is entitled in right of her Crown, either in a Court of law or in a Court of Equity, and that where she has caused a Court of Equity to be informed that an intrusion has been committed on her land, although no matter of equitable jurisdiction has been stated, yet the information will be entertained: but in such cases if any question of law arises, the Court will put it in the course of trial by a Court of Law, and will retain the information till the result of such trial is known (g). In general, however, suits on behalf of the Crown are instituted in the Court which, by its constitution, is most properly adapted to the case; and the Court of Exchequer being the general Court for all business relating to the Queen's revenue or property, the practice has been to institute there all proceedings relating to the property of the Crown. By 4 & 5 Vict. c. 5, s. 1, it is enacted, "that on the 15th day of October, 1841, all the power, authority, and jurisdiction of her Majesty's Court of Exchequer at Westminster as a Court of Equity, and all the power, authority, and jurisdiction which shall have been conferred on, or committed to the said Court of Exchequer by or under the special authority of any Act or Acts of Parliament, (other than such power, authority, and jurisdiction as shall then be possessed by, or be incident to, the said Court of Exchequer as a Court of Law, or as

Informations relating to the lands and revenues of the Queen are usually in the Exchequer.

Prince of Wales v. Sir J. St. Aubyn, Wightw. 167, and the cases there cited; vide etiam Attorney-General v. The Mayor of Plymouth, ibid. 134.

⁽c) The King v. The Countess Dowager of Arundel, Hob. 131. (f) 1 Vern. 277, 370; 2 Ch. R. 353. S. C.

⁽g) Vide Attorney-general to the

shall then be possessed by the said Court of Exchequer as a Court of Revenue, and not heretofore exercised or exerciseable by the same Court sitting as a Court of Equity,) shall be by force of this Act transferred and given to ber Majesty's High Court of Chancery, to all intents and purposes in as full and ample a manner as the same might have been exercised by the said Court of Exchequer, if this Act had not passed." It appears from the case of the Attorney-general v. Kingston (h), that a doubt exists upon the words of this statute, as to whether there still remains in the Court of Exchequer an equitable jurisdiction in matters affecting the Before this Act, many cases occurred, in which proceedings relating to the rights of the Crown were commenced in the Court of Chancery, but they were, in general, confined to cases of purpresture or nuisance, or other matters where the proceedings Where a relahad been commenced at the relation of individuals, who, as they tor is concernwere considered responsible for the costs and conduct of the suit, were in general at liberty to commence it in whatever Court of competent jurisdiction they pleased.

In what Courts.

In all cases where the right of the Queen, or of these who The Attorney-partake of her prerogative, are the subject of the suit, the name general, or if no Attorney, of the Queen is not, as we have seen, made use of as the party the Solicitorcomplaining, but the matter of complaint is offered to the Court general may by way of information given by the proper officer. That officer, of Crown if the information is exhibited in any of the Supreme Courts at Westminster, is the Attorney-general, or if the office of Attorneygeneral should happen to be vacant, the Solicitor-general (i) (1).

Besides the Attorney and Solicitor-general, who are the officers In county palafor conducting the Queen's business in her Courts at Westminster, tine of Lancasthe Queen has officers of the same description in the county palatine of Lancaster and in the duchy of Lancaster, whose duty it is In duchy of to conduct the business of the Crown in the Courts belonging to Lancaster. those jurisdictions (j). The Bishop of Durham, as possessing

(k) 6 Jurist, 155. (i) Ld. Red. 18; Wilkes's case, 4 Bur. 2527.

(j) The Court of the duchy chamber of Lancaster has both a legal and equitable jurisdiction with regard to lands within its survey, and proceedings relating to the property of the Crown within its jurisdiction are generally commenced by information by

the Attorney-general of the jurisdiction. Per Wood, B.; Attorney-general for the Prince of Wales v. St. Aubyn, Wightw. 217. It seems, however, that the Court of Chancery has a concurrent jurisdiction within the duchy Court of Lancaster. Levington v. Woton, 1 Ch. Rep. 52; Toth. 135; Hardr. 171.

⁽¹⁾ Story Eq. Pl. § 49; 1 Smith Ch. Pr. 99, 100.

tine of Durham In the franchise of Ely.

In county pala- jura regalia in the county palatine of Durham, used formally to appoint his Attorney-general within his jurisdiction, and the Bishop of Ely had the same privilege within his franchise, but by 6 & 7 Will. IV. c. 19, the palatine jurisdiction of the Bishop of Durham has been separated from the bishopric, and vested in the Crown; and by 6 & 7 Will. IV. c. 87, the secular jurisdiction of the Bishop of Ely has been abolished, so that these privileges no longer exist.

> Previously to the passing of the Act of the 11 Geo. IV. & 1 Will. IV. c. 70, by which the jurisdictions of the Courts of Great

> ter, and of the Chamberlain and Vice-Chamberlain of Chester,

In Chester and Session in the principality of Wales and county palatine of Chesin the great sessions in Wales.

In particular Jurisdictions.

In the duchy of Cornwall.

were transferred to the Courts at Westminster, informations on behalf of the Crown to these Courts respecting matters within their jurisdiction must have been by the Attornies-general of those jurisdictions. But since the passing of that Act, although by the 34th sect. the offices of Attorney-general of Chester and of Wales are continued to the present holder of them till her Majesty's pleasure shall be otherwise declared, yet, as their offices are circumscribed by the jurisdictions to which they are appointed, and the Courts of Equity within those jurisdictions are removed, no informations in Equity can be exhibited by them, because no person who sustains the character of Attorney-general in a county palatine or other jurisdiction of this description is recognized as such in Westminster-Hall (k). In this respect, however, the Attorney-general for the Duke of Cornwall appears to be in a different situation from Attornies-general of counties palatine, since it has been decided, in the case of the Attorney-general for the Prince of Wales v. Sir John St. Aubyn, that he may exhibit an English information on behalf of the Prince of Wales, as Duke of Cornwall, in the Queen's Courts at Westminster. It seems, however, that this rule holds only during such time as there is a Duke of Cornwall in existence, and that when the duchy of Cornwall is in the hands of the Crown, the Queen's Attorney-general conducts all proceedings relating to the duchy. When there is a Duke of Cornwall who has not attained his majority, such proceedings are also carried on by the Queen's Attorney-general, taking along with him the Attorney-general for the duchy of Cornwall, not, as it seems, that he is joined as a necessary party, but rather from attention to the Duke of Cornwall in respect of his

⁽k) Arg. Attorney-general to the Prince of Wales v. Sir J. St. Aubyn, Wightw. 178.

When the Duke of Cornwall comes of age, the In the duchy interests (1). proceedings may, it would appear, be taken up and prosecuted by his Attorney-general alone (m). And if the Duke of Cornwall should die pendente lite, the proceedings may be carried on by the Queen's Attorney-general by information of revivor and supplement (n).

of Cornwall.

Besides the cases in which the immediate rights of the Crown Of Informaare concerned, the Queen's officers may, in some cases, institute tions. proceedings on behalf of those who claim under the Crown, by _ grant or otherwise, or, more correctly speaking, those who claim the Crown is under the Crown may make use of the Queen's name, or of that ly concerned. of her proper officer, for the purpose of asserting their right against a third party. Thus a chose in action may be assigned to the Queen, and may also be granted or assigned by her to another of Crown's person; and in this latter case the grantee may either sue for it in chose in action. his own name or in that of the Queen (o). But if he sues in his own name he must make the Attorney-general a party to his suit. In Balch v. Wastall (p), A. having outlawed B., brought a bill Where Crown against C., a trustee for B., with respect to an annuity, to subject ly concerned. this annuity to the plaintiff's debt, and the Court held, that forasmuch as by the outlawry all the defendant's interest, as well equitable as legal, was vested in the Crown, the plaintiff must not only get a grant thereof from the Crown, but must make the Attorney-general a party to the suit (q).

not immediate-

Informations may also be exhibited by the Queen's Attorney-gen- _ eral or other proper officer in support of the rights of those whose of the Queen as protection devolves upon the crown as supreme head of the of the Church. Thus, the Queen as supreme head of the Church, is the proper guardian of the temporalities of the bishoprics; and an information may therefore be brought by the Attorney-general to stay waste committed by a bishop (r).

In like manner the Attorney-general may exhibit informations on behalf of individuals who are considered to be under the pro-patrice, for charities, &c. tection of the Crown as parens patriæ, such as the objects of general charities (1) idiots and lunatics. Moreover, this privilege of

- (1) Vide Wightw. 255, 256, and the proceedings there cited.
- (m) Vide Wightw. 246, and the proceedings there cited.
  (n) Ibid. 25.
- (o) Dyer, 1 Pl. 7, 8; Keilw. 1, 69; 5 Bac. Ab. tit. Prerog. F. 3; Miles v. Mer. 427; Jefferson v. Bishop Williams, 1 P. Wms. 252; Earl of ham, 1 Bos. & Pull. 129, 131. Stafford v. Buckley, 2 Ves. 181.
- (p) 1 P. Wms. 445.
  (q) Vide etiam Hayward v. Fry, ibid. 446; and Rex v. Fowler, Bunb. 38.
- (r) Knight v. Mosley, Amb. 176; Wither v. D. & C. of Winchester, 3 Mer. 427; Jefferson v. Bishop of Dur-

⁽¹⁾ With us the information of the Attorney-General may be the appro-

concerned as parens patriæ.

Where Crown the Attorney-general is not confined to suits on behalf of charities, strictly so called, but has been held, in many instances, to extend to cases where funds have been made applicable to legal and general purposes (s). In the case of the Attorney-general v. Compton (t), which was an information for the purpose of compelling the restitution of money alleged to have been improperly applied out of funds raised for the relief of the poor, by means of rates and assessments, Sir J. L. Knight Bruce, V. C., said, "that he apprehended the rule was, that where property affected by a trust for public purposes is in the hands of those who hold it devoted to that trust, it is the privilege of the public that the Crown should be entitled to intervene by its officer, for the purpose of asserting, on behalf of the public generally, that public interest and that public right, which probably no individual could be found willing effectually to assert, even if the interest were such as to In some instances, also, the Attorney or Solicitor-general is authorized to institute informations by particular Acts of Parliament, as in the case of proceedings under the Marriage Act, 4 Geo. IV. c. 76, and under the Acts (u) for giving additional facilities in applications to Courts of Equity regarding the management of estates or funds belonging to charities.

Of informations on behalf of idiots and lunatics.

With respect to idiots and lunatics, it is to be observed that suits on their behalf are usually instituted by the committees of their estates (1); but that sometimes where there has been no committee, or where the interest of the committee is likely to

(t) 1 Y. & C. 417. (s) Attorney-general v. Brown, 1 Swanston, 265; Attorney-general v. (u) 59 Corporation of Shrewsbury, 6 Beav. IV. c. 57. (u) 59 Geo. III. c. 91; and 2 Will. 220.

priate remedy in cases of charities, where the object is wholly undefined, or the executors or trustees may apply directly to the Court for direction. As in the case of Wright v. The Trustees of the Meth. Epis. Church, 1 Hoff. Ch. R. 202; 2 Kent, (5th ed.) 288, note (a).

In this country, the Legislature or Government of the State, as parens patrix, has the right to enforce all charities of a public nature, by virtue of its general superintending authority over the public interests, where no other person is entrusted with it. 4 Kent. (5th ed.) 508, note (b).

(1) Story Eq. Pl. § 64. In some of the States in America the Courts of Equity are entrusted with the authority to appoint committees for idiots and lumstice are in England, and in such cases the idiote and lumstice are in England.

lunatics, as in England, and in such cases the idiots and lunatics sue by their committees. In other States, idiots and lunatics are by law placed under guardians appointed by other courts, and ordinarily by the Courts of Probate of the State. In such cases the idiots and lunatics sue and defend suits, by their proper guardians, unless some other is specially appointed for that purpose. Story Eq. Pl. § 65. Thus in New York by statute the Court of Chancery has the care and custody of idiots and lunatics. 2 Rev. Stat. N. Y. 51, et seq. (ed. 1829); Matter of Wendell, 1 John. Ch. 600; Brasher s.

clash with that of the persons whose estates are under their care. informations have been exhibited on their behalf by the Attorneygeneral, as the officer of the Crown (x). Where informations have been filed on behalf of persons found lunatic, but who have had no committee appointed, the Court will proceed to give directions for the care of the property of the lunatic, and for proper proceedings to obtain the appointment of a committee (y). Persons incapable of acting for themselves, though not coming under the description of idiots or lunatics, have been permitted to sue by their next friend without the intervention of the Attorney-general (z).

Of Informations, etc.

It seems that when an information is filed on behalf of a Lunatic must lunatic, he must be named as a party to the suit, and that merely be a party, naming him as a relator will not be sufficient (a) (1); but in the cases of the Attorney-general v. Parkhurst (b), and Attorneygeneral v. Woolrich (c), a distinction appears to be taken between cases where the object of the suit is to avoid some transaction of the lunatic, on the ground of his incapacity, and those in which it is merely to affirm a contract entered into by him for his benefit, or to assert some claim on his behalf. In the former case it was unless to avoid held that the lunatic ought not to be named as plaintiff, because his own acts. no man can be heard to stultify himself (2). If he is named, however, it will be no ground for demurrer (d). The reason for making a lunatic a party in proceedings of this nature appears to be, that as no person can be bound by a decree in a suit to which he or they under whom he derives title are not parties, and as a lunatic may recover his understanding, the decree will not have the effect of binding him unless he is a party to the suit; and upon the same principle it is held, that where a suit is instituted

⁽z) Attorney-general v. Parkhurst, 1 Ch. Ca. 112; Attorney-general v. Woolwich, ibid. 153; Attorney-general v. Tyler, 1 Dick. 378; 2 Eden,

⁽y) Attorney-general v. Howe, Ld. Red. 23, n. 3.

⁽z) Liney v. Wetherley, Ld. Red.

^{23,} n. a.

⁽a) Attorney-general v. Tyler, 1 Dick. 378.

⁽b) 1 Cha. Ca. 112.

⁽c) Ibid. 153. (d) Ridler v. Ridler, Eq. Ca. Ab. 279.

Van Courtlandt, 2 John. Ch. 242, 246. In Massachusetts, the Courts of Probate have the exclusive authority to appoint guardians of idiots and lunatics. Rev. Stat. Mass. ch. 79, § 8, § 9; Story Eq. Pl. § 65, note (1). For Virginia, see Bolling v. Turner, 6 Rand. 584; Vermont, see Smith v. Burnham, 1 Aik. 84.

⁽¹⁾ See Story Eq. Pl. § 64.

⁽²⁾ As to this maxim see post, 88, note.

On behalf of Idiots and Lunsties.

on behalf of the lunatic by his committee, the committee must be named as a co-plaintiff, in order that the right which the committee acquires in the lunatic's estate, by virtue of the grant from the Crown, may be barred. The same reason does not apply to cases of idiots, because in contemplation of law they never can acquire their senses; they are, therefore, not considered necessary parties to proceedings on their behalf (e).

Of informaticular statutes. Charity Commissioners' Act.

With respect to informations exhibited under particular Acts tion under par- of Parliament: By the 59 Geo. III. c. 91, which was passed for giving additional facilities in applications to Courts of Equity regarding the management of estates or funds belonging to charities, the commissioners appointed under the 58 Geo. III. c. 91, and 59 Geo. III. c. 81, or any five or more of them, are authorized and empowered, whenever, upon any investigation had or taken by or before them, any case shall arise or happen, in which it shall appear to the said commissioners that the directions or orders of a Court of Equity are requisite for remedying any neglect, breach of trust, fraud, abuse or misconduct, in the management of any trust created for any charitable purposes, as therein mentioned, or of the estates or funds thereunto belonging, or for the regulating the administration of any such trust, or of the estates or funds thereof, to certify the particulars of such case in writing under their hands to her Majesty's Attorney-general; and thereupon her Majesty's Attorney-general is authorized and empowered. if he shall so think fit, either by a summary application in the nature of a petition, or by information, as the case may require, to apply to or commence a suit in Her Majesty's High Court of Chancery, stating and setting forth the neglect, breach of trust, fraud, abuse or misconduct, or other cause of complaint or application, and praying such relief as the nature of the case may require. This Act has been continued by the 2 Will, IV. c. 57. s. 11, by which Act the Attorney-general's certificate that the particulars of the case in question have been duly certified to him by the commissioners, is made sufficient evidence of such certifying by the commissioners (f). It is to be observed, that in proceedings under these Acts, the Attorney-general is not considered liable to costs in the event of failure; but although as an officer

(c) Attorney-general v. Woolrich, 1 Cha. Ca. 153.

Attorney-general may, under their authority, proceed upon any certificate of the commissioners, made while their authority was in existence. torney-general v. Bullin, Rolls, Jan. 22, 24, 1835.

⁽f) These acts are perpetual; and it has been held that, although the Act under which the commissioners were appointed has expired, still the

suing in discharge of his public duty he can never be made to Charity Compay costs in a Court of Equity, yet it is not the rule of a Court of Equity that he cannot receive costs, and therefore in an information under the first-mentioned Act the defendant was ordered to pay the Attorney-general his costs (g).

By the Marriage Act, 4 Geo. IV. c. 76, s. 23, if any valid mar- Marriage Act. riage solemnized by license shall be procured by a party to such marriage to be solemnized between persons one or both of whom Under parshall be under the age of twenty-one years, not being a widower ticular Stator widow, contrary to the provisions of the Act, by means of such party falsely swearing as to any matter to which such party is required personally to swear (such party wilfully and knowingly so swearing); or if any valid marriage by banns shall be procured by a party thereto to be solemnized by banns between persons, one or both of whom shall be under the age of twenty-one years, not being a widower or widow, such party knowing that such person as aforesaid under the age of twenty-one years had a parent or guardian then living, and that such marriage was had without the consent of such parent or guardian, and knowing that banns had not been published according to the provisions of the Act, and having caused or procured the undue publication of banns; then and in every such case her Majesty's Attorney-general (or her Majesty's Solicitor-general in case of the vacancy of the office of Attorney-general,) may, by information at the relation of a parent or guardian of the minor whose consent has not been given to such marriage, and who shall be responsible for any costs incurred in such suit, (such parent or guardian previously making oath as is thereinafter required,) sue for a forfeiture of all estate, right, title and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage.

In all cases of informations which immediately concern the Of Relators. rights of the Crown, its officers proceed upon their own authority, necessary. without the intervention of any other person (h); but where the information does not immediately concern the rights of the Crown. they generally depend upon the relation of some person whose name is inserted in the information, and who is termed the Relater (i) (1). This person in reality sustains and directs the suit,

^{-,} Vern. 277, 370; Attorney-(g) Attorney-general v. Lord Ash-70. general v. Croft, 1 Bro. P. C. 222. burnham, 1 S. & S. 394. (k) Ld. Red. 18; Attorney-general (i) Ld. Red. 18; 2 Ves. J. 247, n.

^{(1) 1} Smith Ch. Pr. (2d Am. ed.) 99; Story Eq. Pl. § 8. Where the suit

Of Relators.

and he is considered as answerable to the Court and the parties for the propriety of the proceedings, and the conduct of them (k). But he cannot take any step in the cause in his own name and independent of the Attorney-general. Where therefore, in the case of the Attorney-general v. Wright (I), notice of motion was given on behalf of a relator, and an objection was made that it ought to have been on behalf of the Attorney-general; Lord Langdale decided, that the notice was irregular, and said that "Relators should know that they are not parties to informations, and have no right of their own authority to make any application to the Court. The Attorney-general is the only person whom the Court recognizes in such cases." And in the Attorney-general v. Barker (m), which was an information, and bill, Lord Cottenham refused to hear the relator in person on behalf of the Attorney-general, and said he could not separate the information from the bill so as to hear him as the plaintiff in the bill. It sometimes happens that the relator has an interest in the matter in dispute, of the injury to which interest he is entitled to complain. In this case his personal complaint being joined to and incorporated with the information given to the Court by the officer of the Crown, they form together an information and bill, and are so termed. In some respects, however, they are considered as distinct proceedings; and the Court will treat them as such, by dismissing the bill and retaining the information, even though the relief to be granted is different from that prayed. Thus in Attorney-general v. Vivian (n), where the record was both an information for a charity and a bill, and the whole of the relief specifically prayed was in respect of an alleged interest of the relator in the trust property, which he did not succeed in establishing, Lord Gifford, although he dismissed the bill with costs, retained the information for the purpose of regulating the charity. It is moreover necessary that the person joined as co-plaintiff should have some individual interest in the relief sought to be obtained by the suit, for in the case of the Attorney-general v. The East India Company (o), the Vice-Chancellor of England allowed a demurrer to the whole record, because persons were made co-plaintiffs who

In what cases they ought to be plaintiffs.

⁽k) Ld. Red. 18.

⁽l) 3 Beav. 447. (m) 4 M. & C. 262.

⁽n) 1 Russ. 226; 2 Swan, 215.

⁽o) 11 Sim. 380.

asked nothing for themselves, and did not show that they were Of Relators. individually entitled to any thing. As however there appeared a case for relief, he gave leave to amend for the purpose of converting the record into an information only; and ordered that the plaintiffs should remain on the record in the character of relators in order that they might be answerable for costs.

But although it is the general practice, where the suit immedi- Where the suit ately concerns the rights of the Crown, to proceed without a re-rights of the lator, yet instances have sometimes occurred where relators have Crown. been named. In such cases, however, it has been done through the tenderness of the officers towards the defendant, in order that the Court might award costs against the relator if the suit should appear to have been improperly conducted, it being a prerogative of the Crown not to pay costs to a subject (p) (1).

It has been said, that as the Queen by reason of her prerogative does not pay costs to a subject, so it is beneath her dignity to receive them. But many instances occur in the course of practice, in which the Attorney-general receives costs. Thus when collusion is suspected between the defendants and the relators, the Attorney-general attends by a distinct solicitor, and always receives his costs. In Attorney-general v. Lord Ashburnham (q). Sir J. Leach, V. C., said, in reference to the asserted principle that the Crown can neither pay nor receive costs, "I find no such principle in Courts of Equity. The Attorney-general constantly receives costs, where he is made a defendant in respect of legacies given to charities (r); and even where he is made a defendant in respect of the immediate rights of the Crown in cases of intestacy, and where charity informations have been filed by the Attorney-general, costs have been frequently awarded him in interlocutory matters, independently of the relator."

The propriety of naming a relator for the purpose of his being Usually named answerable for costs, and the oppression arising from a contrary in cases of charities. practice, were particularly noticed by Baron Perrot, in a cause in the Exchequer, Attorney-general v. Fox (s), in which case no relator was named; and though the defendants finally prevailed, they were put to an expense almost equal to the value of the prop-

⁽p) Vide 3 Bl. Com. 400. (q) 1 S. & S. 394.

⁽r) Moggridge v. Thackwell, 7 Ves.

⁽s) Ld. Red. 19;

^{(1) 2} Maddock Princ. & Prac. Ch. (3 Lond. ed.) 203 and note; 1 Smith Ch. Pr. (2nd Am. ed.) 99; Story Eq. Pl. § 8.

But not absosolutely necessary. Semble.

Of Relators. erty in dispute. The introduction of a relator, however, in cases in which the information is merely concerning the rights of the Crown, is a mere act of favor on the part of the Crown and its officers; and it appears to have been the opinion of Lord Eldon that, even in informations concerning charities, the introduction of a relator was an indulgence on the part of the Crown, which though usual might be withheld. In the Matter of the Bedford Charity (t), in speaking of informations concerning charities, his Lordship said, that "there is no doubt, that though a relator is commonly required for the purpose of securing costs, the Attorney-general may, if he pleases, proceed without a relator." This dictum appears to be at variance with the opinion of Lord Thurlow, in the Attorney-general v. Oglander (u), in which his Lordship is reported to have expressed his belief that an information without a relator would not do; and the opinion of Lord Thurlow upon this point appears to have been adopted by Lord Redesdale (x). But it is worthy of remark that in the cases which are referred to as authorities upon this subject in the margin, of Attorney-general v. Oglander, the point does not appear to have arisen (y); and with respect to another case, referred to by the Annotator upon Mr. Vesey's Reports (z), to show the necessity of there always being a relator, it is to be observed, that it was a case arising upon a plea of outlawry in the relator, which was held to be a good plea; but the decision was given upon the ground that, although the Attorney-general was plaintiff, yet the relator was to have the whole benefit or loss of the suit, and was himself a party to it, for it would abate by his death, &c.; and the King's name was only made use of by the form of the Court, and he was not directly concerned at all, and very little by consequence, and the suit was not for the King's duty, but for the relator's interest. Upon the whole, therefore, it seems, that although in cases of informations for charities, the general and almost universal practice is to have a relator for the purpose of answering the costs, yet the rule is not imperative; and the Attorney-general, as the officer of the Crown, may, in the exercise of his discretion, exhibit such an information without a relator. In confirmation of this it is to be observed, that in informations under the statute (a), for giving

⁽t) 2 Swan. 520

⁽u) 1 Ves. J. 246. (z) Ld. Red. 78.

⁽y) Attorney-general v. Smart, 1 Ves. 72; Attorney-general v. Mid-dleton, 2 Ves. 327.

⁽z) Attorney-general of the duchy of Lancaster v. Heath, Prec. in Ch. 13.

⁽a) 59 Geo. III. c. 91, continued and extended by 2 Will. IV. c. 57.

additional facilities in applications to Courts of Equity regarding Of Relators. the management of estates or funds belonging to charities, it is not the practice to have a relator.

All persons, who are not under any of the legal disabilities af- Who may be ter mentioned, may be relators in informations concerning chari-relators. ties (1); and dissenters may fill that character for dissenting charities (b), and the maintenance of a Protestant dissenting chapel is considered a charitable institution for this purpose (c).

It does not appear to be required in cases of charities, that the Whether they relator should be personally interested in the charity, though from ought to be inwhat was said by Lord Hardwicke in Attorney-general v. Bucknall (d), it appears that some interest in the relator, however remote, was considered necessary. Lord Gifford, M. R., however, in Attorney-general v. Vivian (e), says, "whatever opinions may have been previously entertained upon this subject, I conceive it is not necessary for relators to have any interest in the subject of the suit."

If am information is exhibited at the relation of a person not in- Effect of their terested in the charity, and it appears that there is ground for the being interestinterference of the Court, though he is mistaken in the relief ed, upon the prayed, the Court will take care, at the hearing, to decree in such a manner as will best answer the purposes of the charity (f), even though the specific relief prayed by the information is refused (g). But it seems that where a person who, in the event of a particular construction of the will or deed by which the charity is founded being considered correct, would be personally interested in the charity, files an information in which he is the relator, insisting upon that construction, and praying relief accordingly, but fails in establishing his case, the information will be dismissed. Thus where a question arose between two charities, one for poor people

(d) Attorney-general v. Fowler, 15 Ves. 85.

⁽b) Attorney-general v. Lord Dudhave an interest in the charity. ley, Cooper, 146.

⁽d) 2 Atk. 328. (s) 1 Russ. 236. In this respect an information differs from a petition under the 52 Geo. III. c. 101, as persons presenting petitions under that Act must, according to the opinion ex-pressed by Lord Eldon in the case of ton, 3 Anst. 820. the Bedford Charity, 2 Swanst. 518,

have an interest in the charity.

(f) 2 Atk. 328.

(g) Per Lord Eldon, in Attorney-general v. Whiteley, 11 Ves. 247; Vide etiam Attorney-general v. Scott, 1 Ves. 413; Attorney-general v. Mayor of Stamford, 2 Swan. 591; Attorney-general v. Parker, 1 Ves. 43; Attorney-general v. Smart. 1 Ves. 72; Attorney-general v. Smart, 1 Ves. 72; 2 Ves. 426; Attorney-general v. Bol-

^{(1) 1} Smith Ch. Pr. (2nd Am. ed.) 99,

Of Relators.

in a particular parish, and the other for poor widows in an almshouse, concerning the right to a legacy given by a will in which there were descriptions applicable to both, and an information was filed at the relation of the latter, the Lord Chancellor (Lord Thurlow) dismissed the information because the relators had no title (h).

Decree made ferent to that insisted upon.

If, however, a person files an information as a relator, claiming upon a title dif- the benefit of the charity for himself, and insisting upon his claim under a title as to which it appears that he is mistaken, though he be found to be entitled under another title upon which he does not insist, a decree will be made. Thus, where the curate of a chapel filed an information in the name of the Attorney-general, in which he himself was the relator, claiming the benefit of an augmentation under the 29 Car. II, c. 8, and the relator founded his case on a right of nomination in the rector, but the defendant proved a right of nomination in the vicar, by whom the relator had been nominated, it was insisted, that though a right was in the relator, yet he must recover according to the right he had set up; but Lord Hardwicke was of opinion, that although if it had been a bill by the curate in his own name, he never could have made a decree to establish a right appearing in him contrary to that set up, yet this, being an information in the name of the Attorney-general, is an answer to that also; for though such an information to establish a charity is mistaken in the circumstance of laying it, yet if it appears that there is a charity, and the right appears in the whole cause, that information cannot be dismissed, but a decree must be made to establish that charity (i). This doctrine, his Lordship observed, "has been frequently laid down in this Court and allowed, because it is considered as a proceeding by an officer of the Crown; and as the King is pater patrie, the information therefore must not be dismissed: so that though the relator has mistaken his title, yet if in the cause a title comes out for him and his successors, he must have that title established" (k).

Whether an a relator.

There is a case in the Precedents in Chancery (1), where a plea outlaw can be of outlawry in disability of the person of the relator in an infor-

(h) Attorney-general v. Oglander,

Attorney-general v. Middleton, 2 Ves.

⁽a) Attorney-general

1 Ves. J. 246.

(i) This rule only applies when it is
a charity instituted by a private person, not to cases of charities incorporated by royal charter under the Great Seal, for they are already established.

⁽k) Attorney-general v. Brereton, 2 Ves. 425.

⁽l) Attorney-general of the duchy of Lancaster, v. Heath, Prec. Ch. 13.

mation, is said to have been allowed in the Duchy Court of Lan- Of Relators. But upon reference to the case, it will be seen that it was the case of an information by the Attorney-general, at the relation of a part owner of coal mines against the other part owners, praying that the defendants might contribute towards certain expenses which the relator had been put to in draining and improving the mines, without which they could not be wrought, so the King would lose his duty; so that in fact the relator was the substantial plaintiff in the suit, and the King's name was only made use of as a matter of form, "the Crown not being directly concerned, and only very little as a matter of consequence." Indeed, the relator is stated in the report to have been himself a party to the suit, so much so that it would have abated by his death.

From the above case it appears, that where a relator himself Of the effect claims an interest in the subject-matter of the suit, and proceeds the relator. by bill as well as by information, making himself both plaintiff and relator, the suit will abate by his death. Where, however, the suit is merely an information, the proceedings do not abate by the death of the relator (m), they can only abate by the death or determination of interest of the defendant (n).

If there are several relators, the death of any of them, while Proceeding there survives one, will not in any degree affect the suit; but if thereupon. all the relators die, or if there is but one, and that relator dies, the suit is not abated, but the Court will not permit any further proceedings till an order has been obtained for liberty to insert the name of a new relator, and such name is inserted accordingly, otherwise there would be no person to pay the costs of the suit in case the information should be deemed improper, or for any other reason should be dismissed (o). Where, however, a relator dies, the application for leave to name a new relator must be made by the Attorney-general, and not by the defendant, otherwise the defendant might choose his own prosecutor (p) (1).

With respect to informations on behalf of idiots and lunatics, it Informations seems that it is not only necessary that the lunatic should be a on behalf of idiots and luparty, but it is also requisite that there should be a relator who natics, must may be responsible to the defendant for the costs of the suit. be by a relator. Thus in the case of the Attorney-general v. Tyler, mentioned in

⁽m) Waller v. Hanger, 2 Bulst. 134. (p) Attorney-general v. Plumtree, (n) Ld. Red. 78. 5 Mad. 452.

⁽o) Ld. Red. 79.

^{(1) 2} Maddock Princ. & Prac. Ch. (3d Lond. ed.) 203, 204.

Lunatic can-

Of Relators the note to Lord Redesdale's Treatise (q), it appears that the lunatic had been made the relator, but that on a motion being made not be relator. that a responsible relator should be appointed, Lord Northington directed that all further proceedings in the cause should be suspended until a proper person should be named as relator in his This appears to be the same cause which has been before referred to, as reported in Mr. Dickens' Reports (r), in which, upon the hearing, it was objected that the lunatic was not a party to the suit, although he was named as relator, and the cause was consequently ordered to stand over, with liberty to amend by adding parties, and, if so advised, to change the information into a bill.

The object in requiring that there should be a relator in infor-

mations exhibited on the part of the Attorney-general, is, as we have seen, that there may be some person answerable for the costs, in case they should have been improperly filed. Thus in the case of Attorney-general v. Smart (s), before referred to, where the information was held to have been unnecessary, and contrary to the right, the costs were ordered to be paid by the relator. But in the case of Attorney-general v. Oglander, before referred to, where the relator insisted upon a particular construction of the will of the person by whom the charity was founded, and in which there was considerable ambiguity, although he failed in satisfying the Court that his construction was the right one, and the information was consequently dismissed, the Court did not make him liable to the costs of the defendant, although it refused to permit the costs to be paid out of the funds of the charity. And in general, where an information prays a relief, which is not granted, but the Court lief is granted, thinks proper to make a decree according to the merits, so that the information is shown to have had a foundation, although the relief is not such as the relator prayed, the relator will not be ordered to pay the costs (t).

liable to costs on dismissal. Not where they bona fide insist upon the construction of a will.

Nor where rethough not the specific relief prayed for.

Allowed their costs out of the fund.

As between solicitor and · client.

And in general, where relators conduct themselves properly and their conduct has been beneficial to the charity, they are allowed their costs. Thus in Attorney-general v. The Brewers' Company (u), the relators (in the report erroneously called the plaintiffs) were allowed their costs out of the improved rents of the charity estates, because they had been serviceable to the charity by easing it of a debt which was claimed against it (x).

- (q) Ld. Red. 23; vide 2 Eden, 230, 1 Ves. J. 246. S. C. (t) Attorney-general v. Bolton, 3 Anet. 820.
- (r) Ante. (s) 1 Ves. 72; Attorney-general v. Parker, 3 Atk. 576; 1 Ves. 43, S. C.;
- (u) 1 P. Wms. 376. (z) Beames on Costs, 24.

seems that in some cases the costs of relators will be taxed as be- Of Relators. tween solicitor and client, as otherwise people would not come forward to file informations (y); and that in special cases they will be allowed their charges and expenses in addition to the costs of the suit.

In the case of Attorney-general v. Ker (z), an order was in the Costs, charges, first instance made to refer it to the Master "to tax and settle the and expenses preparatory to costs, charges, and expenses of the relator, incidental and prepara- the suit. tory to these causes, properly incurred, in addition to the costs thereinbefore directed to be paid by the defendant, to be paid by the trustees of the hospital of St. Thomas for the time being, or the treasurer thereof, out of the funds belonging to the hospital." To this order two objections were made: first that the decree was wrong so far as it gave the relator "the extra costs, charges, and expenses incidental and preparatory to the cause properly incurred;" 2ndly, That these extra costs, &c. ought not to be charged on the whole property of the hospital generally, but only on the property which was the subject of the information. Lord Langdale, M. R., said, "on considering the cases which have occurred, it appears that the relator in a charity information, where there is nothing to impeach the propriety of the suit, and no special circumstances to justify a special order, is, upon obtaining a decree for the charity, entitled to his costs as between solicitor and client, and to be paid the difference between the amount of such costs and the amount of the costs which he may recover from the defendants out of the charity estate. There may be special cases in which the relator may be entitled to charges and expenses in addition to his costs of the suit as between solicitor and client; but it appears to me that such cases must depend upon their peculiar circumstances, to be brought forward and established by evidence on proper occasions. Upon the second point I find that Out of what there are several cases in which the costs to be paid by the trus-fund. tees of a charity, have been ordered to be paid out of the funds generally; but the trustees objecting, it appears to me more regular and proper, in the first instance at least, to charge the costs which fall upon the charity estate on the fund recovered by the information, or on the estate which is the subject of the suit." The decree was accordingly varied, and the relator, instead of being allowed his costs, charges, and expenses incidental to the

⁽y) Attorney-general v. Taylor, cited in Osborne v. Denne, 7 Ves. 424; gridge v. Thackwell, 7 Ves. 36. see also 7 Ves. 425; Attorney-general v. Carte, 1 Dick. 113; Beames on

Of Relators.

causes properly incurred, was only allowed his costs as between solicitor and client: and the costs and sums which were to be paid by the trustees, instead of being directed to be paid out of the funds of the hospital, were made a charge on the property which was the subject of the suit, and ordered to be raised by sale or mortgage thereof.

Should be person of substance.

As the principal object in having a relator is, that he may be answerable for the costs of the proceedings, in case the information shall appear to have been improperly instituted or conducted, it follows as a matter of course that such relator must be a person of substance, and if it is made to appear to the Court, after the information is filed, that the relator is not a responsible person, all further proceedings in the information will be suspended till a proper person shall be named as relator (a).

Dismissal of informations.

It is to be observed, that an information by the Attorney-general cannot be dismissed for want of prosecution, it is his privilege to proceed in what way he thinks proper; but an information in his name by a relator, is subject to be dismissed for want of prosecution with costs.

#### SECTION II.

# The Attorney-general of the Queen Consort.

As the Queen Consort is in law a public person exempt and distinct from the King, and may purchase and acquire lands and separate property in goods, and dispose of them by will (b) or otherwise, without the concurrence of her husband, and is to all intents and purposes a feme sole, so she may sue and be sued without her husband being joined in the proceedings (c). But, like the King, she does not sue, nor is she sued in her own name; and as she has an Attorney and Solicitor-general of her own, suits in equity on her behalf are commenced by her Attorney-general by information, and not by bill (d).

Sues by her Attorney-general.

Secus, a Queen Dowager.

It seems that a Queen Dowager (e) has not the same privilege as a Queen-Consort.

(a) Attorney-general v. Tyler, 2 Eden, 230; see also Attorney-general v. Knight, 3 M. & C. 154. (b) 39 & 40 Geo. III. c. 88. (c) 1 Bl. Com. 219.

(d) 17 Vin. Ab. tit. Prerog. B. e. pl.

(e) Vide Attorney-general v. Tarrington, Hardres, 219.

Informations.

#### SECTION III.

# The Attorney-general to the Prince of Wales.

The Prince of Wales, as Duke of Cornwall, may also, as has Informations been shown, sue in the Queen's Courts, for matters relating to Attorney-that duchy, by information in the name of his Attorney-general; general. but whether his right to do so arises merely from his being in spessession of the dukedom, or is consequent upon his dignity as relating to his Prince of Wales, does not clearly appear; and it should be property as Duke of Cornmentioned, with reference to this point, that there is one prewall. cedent of an information by the Attorney-general of the Prince, in his character of Prince, touching the reversion to a wood in Devonshire, which had been granted to him (g).

It seems that where there is no Prince of Wales, an information Where no relating to the rights of the duchy of Cornwall is filed by the Prince of Queen's Attorney-general; and that where there is a Prince of der age. Wales, but he is under age, the information is usually filed by the Queen's Attorney-general, joining with him the Attorney-general for the Prince as Duke of Cornwall (h)

In a case where an information was filed by the Attorney-gen- In case of eral for the Prince of Wales as Duke of Cornwall, and the Prince the death of died, the suit was revived by an information in the nature of a bill the Prince. of revivor filed by the King's Attorney-general, and a demurrer to the information was overruled (i).

#### SECTION IV.

## Governments of Foreign States.

It seems to have been considered by Lord Thurlow as a doubtful point whether the sovereign of a foreign state can sue in the municipal courts of this country, and whether the claims of such a person are not matter of application from state to state (k). The point, however, has been lately determined in the affirmative, May sue.

&c. of Plymouth, Wightw. 134.

(k) Barclay v. Russell, 3 Ves. J.

431; vide stiam The Nabob of the
Carnatic v. East India Company, 1
Ves. J. 371, in which the authorities

⁽g) Vide the judgment of Ld. Ch. B. Macdonald, in Attorney-general of Prince of Wales v. Sir J. St. Aubyn, Wightw. 167.

 ⁽a) Ibid.
 (b) Attorney-general v. The Mayor, upon this point are collected.

of Foreign States.

Governments in the case of The King of Spain v. Machado (1), which was a bill filed on behalf of the King of Spain and of two other persons resident in London, claiming some property which had been received by one of the defendants under a treaty between France and Spain, and which it was alleged was the property of the King of Spain. To this bill a general demurrer was put in; and amongst other grounds of demurrer it was contended, that being a foreign absolute sovereign, he was not capable of maintaining a suit in a Court of Equity here, or at least, that he was not capable of maintaining a suit for the enforcement of alleged rights belonging to him only in his royal character. This demurrer was allowed by Lord Lyndhurst, but upon a different ground, namely, that the parties, who had been joined with the King of Spain as co-plaintiffs, had no interest in the subject-matter of the suit, and after the allowance of the demurrer, the King of Spain alone filed another bill against the same defendants, for the same purposes as before, and the defendants demurred again, but the demurrer was overruled by the Lord Chancellor (m), and his Lordship's judgment has been confirmed by the House of Lords on appeal. And in giving judgment upon that occasion, Lord Redesdale observed, "This is one of the clearest cases that can be stated. I conceive that there can be no doubt that a sovereign may sue. If he cannot, there is a right without a remedy; for it is only by suit in Court, that the respondent can obtain his remedy: he sues as every sovereign must sue, generally either on his own behalf, or on behalf of his subjects " (n) (1).

> (l) 4 Russel, 225; Hullett v. King of Spain, 2 Bligh, N. S. 31; vide etiam City of Berne v. Bank of England, 9 Ves. 347; Dolder v. Bank of England, 10 Ves. 353; Dolder v. Lord Hunt-ingfield, 11 Ves. 283. (m) King of Spain v. Machado, 4

Russ. 560; vide etiam The Columbian

Government v. Rothschild, 1 Sim. 94; King of Hanover v. Wheatley, 4 Beav. 78.

(n) 2 Bligh, N. S. 60; and see Duke of Brunswick v. King of Hanover, 6 Beav. 111; and post, on the liability of foreign states to be sued.

If a country were to refuse to permit a foreign sovereign to sue in its courts, it might become a just cause of war. Story Eq. Pl. § 55; King of Spain 5. Mendazabel, 5 Sim. 596; Edwards on Parties in Eq. 33, 34, 35; Calvert on Parties, ch. 3, § 27, pp. 310, 311.

By the Constitution of the U. States, foreign States are expressly authorised

to sue in the courts of the United States. See Story Eq. Pl. § 55 note;

Const. U. S. Art. III, § 2.

One of the States of the Union may appear as plaintiff in the Supreme Court of the United States, against either another State, or the citizens

⁽¹⁾ It was formerly a subject of much forensic discussion, whether foreign sovereigns could maintain suits in the Courts of Equity of another country; but the doctrine is now established in affirmance of their rights, upon very satisfactory principles. See Story Eq. Pl. § 55; Brown v. Minis, 1 M'Cord, 80; 2 Kent, (5th ed.) 285, in note.

To entitle a foreign government to sue in the Courts of this Governments country, it is necessary that it should have been recognized by the government here. This point appears to have been first discussed in the case of The City of Berne in Switzerland v. The Bank of Secus, where England (e), which arose from the application of a person describ- not recoging himself as a member of the common council chamber of the nized. city of Berne, on behalf of himself and of all others the members of the common council chamber and the burghers and citizens of that city, to restrain the Bank of England and South Sea Company from permitting the transfer of certain funds standing in the name of trustees under a purchase by the old government of Berne before the revolution: the application was opposed on the ground, that the existing government of Switzerland, not being acknowledged by the government of this country, could not be noticed by the Court; and Lord Eldon refused to make the order, observing, that it was extremely difficult to say that a judicial Court can take notice of a government never authorized by the government of the country in which the Court sits; and that whether the foreign government was recognized or not, was matter of public notoriety (2).

The fact of a foreign government not having been acknow- The fact of a ledged, is a matter of public notoriety, and must be judicially foreign state not being retaken notice of by the Court, even though there is an averment in-cognized is troduced into the bill, that the government in question has been re-judicially no-ticed by the cognized (p). Thus, where in order to prevent a demurrer it was Court. falsely alleged in the bill that a revolted colony of Spain had been recognized by Great Britain as an independent state, and a demurrer was nevertheless put in, the V. C. of England allowed the demurrer, observing, that if the plaintiff makes the fact, that this is an independent government recognized by the government of this country, where it is not so, the foundation of his case, the Court must judicially take notice of what is the truth of the fact, notwithstanding the averment on the record, because nothing is

(e) 9 Ves. 347; and see Dolder v. der v. Lord Huntingfield, 11 Ves. Bank of England, 10 Ves. 353; Dol- 283.

(p) Taylor v. Barclay, 2 Sim. 213

of Foreign States.

thereof. Const. U. S. Art. III, § 2; Governor of Georgia v. Aladrago, 1 Peters, 110; U. States v. Peters, 5 Cranch, 115; U. States v. Blight, 3 Hall, Law Jour. 197; Osborn v. United States Bank, 9 Wheat. 857; U. States v. Percheman, 7 Peters, 51; N. York v. Connecticut, 4 Dallas, 1; New Jersey v. New York, 5 Peters, 284; Rhode Island v. Massachusetts, 13 Peters, 23, § 6; 14 Peters, 210; 3 Story, Const. U. S. § 1675—1683; Nabob of the Carnatic v. East India Co. 1 Sumner's Ves. 371 note, (a); post, 137 note.
(2) Story Eq. Pl. § 55; Gelston v. Hoyt, 3 Wheat. 394.

of Foreign States.

Governments taken to be true except that which is properly pleaded, and that when a fact is pleaded which is historically false, and which the judges are bound to take notice of as being false, it cannot be said to have been properly pleaded merely because it is averred, and the Court must take it just as if there had been no such averment on the record (q).

Must sue in such a form as that the defendants may file a cross bill.

Where a foreign state comes for the aid of this Court in the assertion of its rights, it must sue in a form which makes it possible for the Court to do justice to the defendants, therefore, where a bill was filed by the government of the State of Columbia, and a person describing himself as a citizen of that state, and minister plenipotentiary for the same to the court of his Britannic Majesty, and residing at No. 33, Baker-street, Portman-square, in the county of Middlesex, Sir J. Leach, V. C., held, that the bill could not be sustained, because there was no public officer named who was entitled to represent the interest of the state, and upon whom process could be served on the part of the defendants, in case they were advised to file a cross bill and to require an answer (r).

A colonial government existing by letters patent.

It seems that a colonial government, existing by letters patent, which is in some degree similar to a corporation possessing rights in England, may sue here, and ought to be regulated by the law of England, under which it has existence (s); thus in Penn v. Lord Baltimore (t), Lord Hardwicke made a decree at the suit of the governor of a province in America, claiming under letters patent by which the district, property and government had been granted to his ancestor and his heirs. The suit was for the specific performance of articles executed in England respecting the boundaries of the two provinces of Maryland and Pennsylvania in North America; and Lord Hardwicke, although he admitted that the original jurisdiction, in cases relating to boundaries, between provinces, was in the King in council, made a decree, founding the jurisdiction upon articles executed in England under seal, for mutual consideration, which he considered as giving jurisdiction to the King's Courts, both of Law and Equity, whatever the subject-matter might be (u).

(q) The Courts of this country will not entertain a suit for matters arising out of contracts entered into by individuals with the government of for-eign countries, which have not been acknowledged by the government of this country. Vide Thompson v. Powles, 2 Sim. 194, and the cases there cited.

(r) The Columbian Government v.

Rothschild, 1 Sim. 94. It is to be observed, that in this case it was stated at the bar, and does not appear to have been disputed, that it had been decided that an ambassador does not represent his government in a Court of justice.

(s) Barclay v. Russell, 3 Ves. 434. (t) 1 Ves. 444.

(u) Cooper, Eq. Pl. 123.

### SECTION V.

## Corporations aggregate.

### Corporations.

THE right to sue is not confined to persons in their natural capacities; the power to sue and be sued in their corporate name is a power inseparably incident to every corporation, whether it be sole or aggregate (x) (1).

As a corporation must take and grant by their corporate name, By charter, so by that name they must in general sue and be sued (2); and may sue and they may sue by their true name of foundation, though they be their true better known by another name. Thus the masters and scholars names of founof the Hall of Valens Mary, in Cambridge, brought a writ by that better known name, which was the name of their foundation, though they were by another. better known by the name of Pembroke Hall, and the writ was held good (v).

As a corporation by prescription may have more than one name, they may sue by the one name or the other, alleging that they and ecription, their predecessors have from time immemorial been known and names, may been accustomed to plead by the one or by the other (z).

A suit, by a corporation aggregate, to recover a thing due to them in their coporate right, must not be brought in the name of sue in the their head alone, but in their full corporate name, unless it appear head alone, that the Act of Parliament or charter by which they are constitu-unless specialted enables them to sue in the name of their head. Yet though it y anthoized. appear that the head of a corporation is enabled to sue in his own rized to sue in name for anything to which the corporation is entitled, this will the name of their head, not preclude it from suing by its name of incorporation: thus, may neverthewhere an action of debt was brought in the name of the President less sue in their name of and College of Physicians to recover the penalty of 51. per month, incorporation.

having several sue by one or - cannot

⁽z) Vide 9 Edw. IV. 21; 13 Hen. VII. 14; 16 Hen. VII. 1; and 21 Hen. (z) 1 Bl. Com. 477. (y) 44 Ed. III. 35; 1 Kyd, on Corp. 253. VI. 4, which last seems contra.

⁽¹⁾ Story Eq. Pl. § 50; 2 Kent, (5th ed.) 283, 284; Hotchkiss v. Trustees, &c. 7 John. 356; Sharon Canal Co. v. Fulton Bank, 7 Wendell, 412; Chambers v. Bap Edu. So. 1 B. Monroe, 216; Le Grand v. Hampden Sidney College, 5 Munf. 324; Trustees of Lexington v. M'Connell, 3 A. K. Marsh. 224; Central Manuf. Co. v. Hartshorne, 3 Conn. 199; Bank of Orleans v. Skinner, 9 Paige, 305.

⁽²⁾ A corporation can only be called upon to answer by its proper name. Binney's case, 2 Bland, 99.

So a corporation can sue only by the name and style given to it by law. Porter v. Neckervis, 4 Rand. 359. See Minot v. Curtis, 7 Mass. 444.

Corporations aggregate.

on the stat. 14 Hen. VIII. c. 15, for practising physic in London without a license, on demurrer to the declaration, this objection, among others, was taken, that the action ought to have been brought in the name of the College only or of the President only; the words of the patent being "quod ipse per nomina Presidentis Collegii seu communitatis facultatis medicina London, should sue and be sued." To this it was answered, that they were incorporated by the name of President and College, and had, in consequence of that, a power to sue and be sued by that name; and that this power was not taken away by the additional affirmative power which was given them (a).

Query, Whether a corporation claiming under a grant made to them by a different name from their corporate name, can sue for it by such name?

It has been determined that where an Act of Parliament grants any thing to a corporation, the grant shall take effect, though the true corporate name be not used, provided the name actually used be a sufficient description of the corporation, though it may be doubtful whether in suing to enforce its claim under that Act, it can use the name therein mentioned (b) (1).

In the case of the Attorney-general v. Wilson (c), which was a joint bill and information, and in which the corporation of Leeds was both plaintiff and relator, an objection was made that a corporation being a body whose identity is continuous, could not be heard to impeach transactions carried into effect in its own name by its former governing body. The objection was overruled by Lord Cottenham, who observed, "that the true way of viewing this is to consider the members of the governing body of the corporation as its agents bound to exercise its functions for the purposes for which they were given, and to protect its interests and

(a) 2 Salk. 451. (b) 12 Mod. 207, 208; 1 Kyd, 256. (c) Cr. & Ph. 1.

⁽¹⁾ A declaration, upon a promissory note, that it was made to the Medway Cotton Manufactory, a corporation, &c. by the name of R. M. & Co. was held good on demurrer. Medway Cotton Manufactory v. Adams, 10 Mass. 360. See Charitable Association v. Baldwin, 1 Metcalf, 359; Commercial Bank v. French, 21 Pick. 586.

If in a contract with a corporation, its name be so given as to distinguish it from other corporations, it is sufficient to support an action in the true corporate name. Hagerstown Turnpike v. Creeger, 5 Har. & J. 122; S.P. Inhabitants of Alloway Creek v. Strong, 5 Halst. 323; Berks and Dauphin Co. v. Myers, 6 S. & R. 16; Woolwich v. Forrest, Penning, 115; First Parish in Sutton v. Cole, 3 Pick. 232; Angell and Ames on Corporations, 60, 61; Mil. and Chil. Turnpike Co. v. Brush, 10 Ohio, 111.

Contracts made by mere servants or agents of corporations may be sued in the name of the corporations. Binney v. Plumley, 5 Vermont, 500. See Procter v. Webber, 1 Chip. 371; African Society v. Varick, 13 John. 38.

A town may sue by the description of A. and B. and the rest of the inhabitants of such town, instead of using the corporate name merely. Barkhamstead v. Parsons, 3 Conn. 1.

property; and if such agents exercise those functions for the pur- Corporations pose of injuring its interests and alienating its property, shall the corporation be estopped in this Court from complaining, because the act done was ostensibly an act of the corporation?"

aggregate.

We have seen before that a corporation cannot, unless specially Corporation, authorized by their constitution, sue by their head alone; so cannot sue or neither can a corporation aggregate, which has a head, sue or be be sued withsued without it, because without it the corporation is incom-out it. plete (d). It is not, however, necessary to mention the name of Head of a corthe head (e), nor is it necessary in the case of corporations aggre-poration need not be called gate to name any of the individual members by their proper chris- by his own tian surnames (f); but if, in a suit in Equity by the members of name, nor any a corporation in their corporate capacity, they are mentioned by bers; but if their names, the suit will not become defective by the death of named, the some of the members, although it would have abated if the suit had abate by their been by them in their individual characters. Thus where the war-deaths. den and fellows of Manchester College filed a bill for tithes in their corporate capacity, but in their proper names, in which a decreee was pronounced, from which both the plaintiffs and defendants appealed, and pending the appeal two of the fellows died; two new fellows were elected in their place, and an objection was taken, on the ground that the new fellows were not parties; Lord Eldon held that there was no defect of parties, and directed the appeal to proceed (k).

A sole corporation suing for a corporate right, having two ca- Must show in pacities, a natural and a corporate, must always show in what right they sue. he sues (1) (1). Thus a bishop or prebendary, suing for land which he claims in right of his bishopric or prebend, must describe himself as bishop or prebendary; and if a parson sue for anything in right of his parsonage, he ought to describe himself as parson. In this respect a sole corporation differs from a corporation aggregate, because the latter having only a corporate capacity, a suit in their corporate name can be only in that capacity (m). It Suit by corpoalso differs from corporations aggregate, in that by the death of ration sole a corporation sole, a suit by him, although instituted in his corpo-death.

⁽d) 2 Bac. Ab. tit. Corp. C. 3, pl. 7. (e) 1 Kyd, 281. (f) 2 Inst. 666.

⁽k) Blackburn v. Jepson, 3 Swanst. 138.

⁽l) 2 Bac. Ab. Corporation, E. 2. (m) Ibid.

⁽¹⁾ A minister, who holds a parsonage in succession, must, in all legal proeeedings, claim it in the right of his town, district, or church Weston v. Hunt, 2 Mass. 500.

Joint-stock Companies.

Of revivor, where suit for his own benefit.

-where for the benefit of others. Master of an hospital.

Parson.

Dean.

Suits by persons assuming corporate charmitted.

rate capacity, becomes abated, which is not the case, as we have seen before, with respect to suits by corporations aggregate.

corporations sole, there is a material distinction with regard to

It is to be observed, that in cases of abatement by the death of

the right to revive. If the plaintiff was entitled to the subject-matter of the suit for his own benefit, his personal representatives are the parties to revive: but if the plaintiff was only entitled for the benefit of others, there his successor is the person who ought to Thus if the master of an hospital, or any similar corporarevive. tion, institute proceedings to recover the payment of an annuity and die, his successor shall have the arrears, and not his executors, because he is entitled only as a trustee for the benefit of his house; but it is otherwise in the case of a parson; there the executors are entitled, and not the successor, because he was entitled to the annuity for his own benefit (n). On the same principle, if a rent to a dean and chapter be in arrear, and the dean die, there is no abatement, because the rent belongs to the succeeding dean and chapter; but if the rent be due to the dean in his sole corporate capacity, it shall go to his executors, and they must revive (o).

Although corporations aggregate are entitled to sue in their corporate capacity, the Court will not permit parties to assume a coracters not per- porate character to which they are not entitled; and where it appears sufficiently on the bill that the plaintiffs have assumed such a character without being entitled to it, a demurrer will hold (1). Thus in the case of Lloyd v. Loaring (p), where a bill was filed by some of the members of a lodge of freemasons against others, for the delivery up of certain specific chattels, in which bill there was great affectation of a corporate character, in stating their laws and constitutions, and the original charter by which they were constituted; a demurrer was allowed, "because the Court will not permit persons who can only sue as partners, to sue in a corporate character; and, upon principles of policy, the Courts of this country do not sit to determine upon charters granted by persons who have not the prerogative to grant them."

Foreign corporations.

A suit may be supported in England by a foreign corporation in their corporate name and capacity (2); and in pleading it is not

(o) Ibid. 78.

⁽n) 1 Kyd, on Corpor. 77.

⁽p) 6 Ves. 773.

⁽¹⁾ Story Eq. Pl. § 497. See Livingston v. Lynch, 4 John. Ch. 573, 596.
(2) A foreign corporation may sue in its corporate name, in Chancery well as at law. Silver Lake Bank v. North, 4 John. Ch. 372; Story Eq. Pl. § 55: 2 Kent. (5th ed.) 924. Societ for Broad Story Eq. Pl. § Wheeler. 55; 2 Kent, (5th ed.) 284; Society for Propagating the Gospel v. Wheeler,

necessary that they should set forth the proper names of the persons who form such corporation, or show how it was incorporated; though if it is *denied*, they must prove that by the law of the foreign country they were effectually incorporated (q) (1).

It is to be observed, that in the above case of Lloyd v. Loaring, Lord Eldon gave the plaintiffs leave to amend their bill, by striking out their present style as plaintiffs, and suing as individuals on

(q) Dutch West India Company v. Van Meyer, 2 Ld. Ray. 1535.

Joint Stock Companies.

2 Gallison, 105; Society for Propagating the Gospel v. New Haven, 8 Wheat. 464; South Carolina Bank v. Case, 8 Barn. & Cressw. 427; Bank of Scotland v. Ker, 8 Simons, 246. It is now settled by statute in New York, that a foreign corporation may, upon giving security for the payment of the costs of suit, prosecute in the courts of the State, in the same manner and under the same checks as domestic corporations. Rev. Stat. N. Y. vol. 2, p. 457. Security for costs is required in such cases in Massachusetts. Rev. Stat. ch. 90, § 10. See Mechanics' Bank of New York v. Goodwin, 2 Green, 439. A corporation chartered in one State may sue in the courts of another State. Williamson v. Smoot, 7 Martin, (Lou.) 31; Lucas v. Bank of Georgia, 2 Stewart, 147; New York Fire Ins. Co. v. Ely, 5 Conn. 560; Cape Fear Bank v. Stinemetz, 1 Hill, 44; Bank of Michigan v. Williams, 5 Wendell, 478; 7 Wendell, 539; Portsmouth Livery Co. v. Watson, 10 Mass. 91; Taylor v. Bank of Alexandria, 5 Leigh, 471; Bank of Edwardsville v. Simpson, 1 Missouri, 184; Lothrop v. Commercial Bank of Scioto, 8 Dana, 114; New Jersey Protection and Lombard Bank v. Thorp, 6 Cowen, 46; Pendleton v. Bank of Kentucky, 1 Monroe, 171; Taylor v. Bank of Illinois, 7 Monroe, 584; Bank of Marietta v. Pindall, 2 Rand. 465; Silverlake Bank v. North, 4 John. Ch. 370; Reed v. Conococheque Bank, 5 Rand. 336; Bank of Augusta v. Earle, 13 Peters, 519; Stewart v. U. S. Ins. Co. 9 Watts, 126; Bank of Washtenaw v. Montgomery, 2 Scammon, 422; Guaga Iron Co. v. Dawson, 4 Blackf. 202; Mechanics' Bank of N. York v. Goodwin, 2 Green, 239; Lewis v. Bank of Kentucky, 12 Ohio, 132.

(1) As to the necessity of proving the corporate existence of a foreign corporation, see School District v. Blaisdell, 6 N. Hamp. 198; Lord v. Bigelow, 8 Vermont, 445; Society, &c. v. Young, 2 N. Hamp. 310; The Guaga Iron Co. v. Dawson, 4 Blackf. 203; Portsmouth Livery Co. v. Watson, 10 Mass. 92. In case of foreign corporations, the plaintiffs, under the general issue, are

In case of foreign corporations, the plaintiffs, under the general issue, are bound to show their corporate capacity, but the Court will take notice ex officio, of the capacity of corporations created in Ohio to sue in that State.
Lewis v. Bank of Kentucky, 12 Ohio, 132. See Agnew v. Bank of Gettysburg, 2 Har. & Gill, 478; Portsmouth Livery Co. v. Watson, 10 Mass. 92;
Eagle Bank of New Haven v. Chapin, 3 Pick. 180.

A foreign corporation could not formerly be sued in Massachusetts. Peckham v. North Parish in Haverhill, 16 Pick. 274. But under the Statute of Massachusetts 1839, ch. 158, made since the above decision, any corporation incorporated in any other State and having property in Massachusetts, may be sued there, and the property of the same is liable to attachment. See Ocean Ins. Co. v. Portsmouth Marine Railway Co. and Trustees, 3 Metcalf, 420.

In Nash v. Rector, &c. of the Evangelical Lutheran Church, 1 Miles, 78, it was held, that a foreign corporation cannot be summoned by service on its chief officer, who, at the time of service, happened to be within the jurisdiction of the Court. See M'Queen v. Middletown Manuf. Co. 16 John. 5; 15 Serg. & R. 173.

In a suit on a joint contract made by the defendant and a foreign corporation, it seems to be unnecessary to name such corporation in the writ, as codefendant. Peckham v. North Parish in Haverhill, 16 Pick. 274. Joint Stock Companies. behalf of themselves and the other persons interested, his Lordship saying that he had seen strong passages, as falling from Lord Hardwicke, that where a great many individuals are jointly interested, there are more cases than those which are familiar, of creditors and legatees, where the Court will let a few represent the whole (r). Ever since that period it has been held, that where all parties stand in the same situation, and have one common right and one common interest, two or three or more may sue in their own names for the benefit of all: and upon this principle large partnerships, or associations in the nature of joint-stock companies, although not incorporated, have been permitted to maintain suits instituted in the name of a few or more individuals interested on behalf of themselves and the other partners in the concern (s).

Under private ment.

Sue by their . officers.

Individual members may sue the directors, &c.

It may be noticed here that many joint-stock companies or asso-Acts of Parlia- ciations for insurance, trading, and other purposes, have from time to time been established by Acts of Parliament, which, although they have not formed them into corporations, have still conferred upon them many privileges, in consequence of which such companies have acquired something of a corporate character; amongst other privileges so conferred, may be reckoned that of suing and being sued in the names of their principal officers. The history of these companies or associations, and of the provisions which have from time to time been introduced into Acts of Parliament. creating or regulating them, has been detailed at considerable length by Lord Eldon in Van Sandau v. Moore (s); and his Lordship's observations may be useful to those upon whom the duty may devolve of framing suits on behalf of or against persons connected with the different classes of joint-stock companies there enumerated. It will suffice, however, for our present purpose, to observe, that although under Acts of Parliament of this description it is competent for the company to maintain suits in the names of the officers designated in the Acts, yet where any of the company wish to sue the directors or others, who are members as well as themselves, they may maintain such a suit in their own individual capacities, either suing by themselves and making the rest of the company defendants, or suing on behalf of themselves and the other members of the association who may come in and contribute to the expenses of the suit. This appears to be the result of the

Blain v. Agar, 1 Sim. 37; Gray v. Chaplin, 2 Sim. & S. 267; and 2 Russell, 126; Van Sandau v. Moore,

⁽r) 6 Ves. 779. (s) Vide Chancey v. May, Prec. in Ch. 592; Good v. Blewitt, 13 Ves. 397; Cockburn v. Thompson, 16 Ves. 1; Russell, 126; Van Sandau 1 Russell, 1441; vide post. 391; Pearce v. Piper, 17 Ves. 1; (s) 1 Russell, 441, 458.

Joint Stock Companies.

decision in Hitchens v. Congreve (t). In that case, the company had been established by an Act of Parliament, which contained a, clause whereby it was declared that all proceedings, whether at law or in equity, to be carried on by or on behalf of the company against any person or persons, whether such person or persons should be a member or members of the company or not, should be instituted and carried on in the name of the chairman or of one of the directors, as the nominal plaintiff; the questions which arose in the suit, the object of which was to compel some of the directors to refund monies improperly withdrawn by them from the stock of the company, were principally whether such a suit could be maintained by a few of the partners in the concern, suing on behalf of the others, without bringing the other partners before the Court? and whether, if such a suit could be instituted, the form of proceedings prescribed by the Act of Parliament ought not to have been followed? and upon these questions, Lord Lyndhurst, upon overruling the demurrer which had been put in to the bill. observed, "It has been argued that the case comes within the clause of the Act of Parliament. I doubt whether the terms of the clause are sufficient to comprehend it, and the spirit of the Act does not extend to transactions such as are in question here. The clause was introduced in order that where the company was concerned on the one side, and individuals contracting with it. being perhaps at the same time members, were concerned on the other, suits might be carried on without being impeded by the objections which would otherwise have occurred."

By stat. 7 Will. IV. & 1 Vict. c. 73, intituled "An Act for better enabling her Majesty to confer certain Powers and Immunities on Trading and other Companies," and repealing the stat. 4 & 5 Will. IV. c. 94, her Majesty is empowered to grant to any company or Sec. 2. body of persons associated together for any trading or other purposes whatsoever, and to the heirs, executors, administrators, and assigns of any such persons, although not incorporated by letters patent, any privilege or privileges which, according to the rules of Common Law, it would be competent to her Majesty, her heirs and successors, to grant to any such company or body of persons in and by any charter of incorporation. By sect. 3, of the same Act, Sec. 3. it is enacted, "that in any such letters patent so to be granted as aforesaid by her Majesty, her heirs or successors, to any such company or body of persons so associated together as aforesaid, but not incorporated, it shall and may be lawful in and by such letters

(t) 4 Russell, 562.

Joint Stock Companies. patent, either expressly or by general or special reference to this Act, to provide and declare that all suits and proceedings whether at Law, in Equity, or in Bankruptcy, or Sequestration, or otherwise howsoever, as well in Great Britain and Ireland, as in the colonies and dependencies thereof, by or on behalf of such company or body or any person or persons as trustee or trustees for such company or body against any person or persons, whether bodies politic or otherwise, and whether members or not of such company or body, shall be commenced and prosecuted in the name of one of the two officers for the time being, to be appointed to sue and be sued on behalf of such company or body, and registered in pursuance of the directions of such appointment and registration respectively thereinafter contained; and that all suits and proceedings, whether at Law or in Equity, by or on behalf of any person or persons, whether bodies politic or others, and whether or not members of such company or body, against such company or body, shall be commenced and prosecuted against one of such officers, or if there shall be no such officer for the time being, then against any member of such company or body: Provided nevertheless, that nothing in this Act, or in such letters patent contained or to be contained, shall prevent the plaintiff from joining any member of such company or body, with such officer as a defendant in Equity, for the purpose of discovery, or in case of fraud."

7 & 8 Vict. c. 110, sec. 24.

By the 24th sect. of the Act of the 7 & 8 Vict. c. 110, intituled "An Act for the Registration, Incorporation, and Regulation of Joint-Stock Companies," it is enacted, that on the complete registration of any company being certified by the registrar of jointstock companies, such company, and the then shareholders therein, and all the succeeding shareholders, whilst shareholders, shall be and are thereby incorporated as from the date of such certificate, by the name of the company as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the company was formed, but only according to the provisions of this Act and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the said company, and thereupon any covenants or engagements entered into by any of the shareholders or other persons with any trustee on the behalf of the company at any time before the complete registration thereof, may be proceeded on by the said company, and enforced in all respects as if they had been made or entered into with the said company after the incorporation thereof, and such company shall continue so incorporated until it shall be dissolved and all its affairs wound up; but so as not in any wise to

Joint Stock

restrict the liability of any of the shareholders of the company under any judgment, decree, or order for the payment of money which shall be obtained against such company or any of the members thereof, in any action or suit prosecuted by or against such company in any Court of Law or Equity; but every such shareholder shall in respect of such monies subject as after mentioned, be and continue liable as he would have been if the said company had not been incorporated, and thereupon it shall be lawful for the said company, and they are thereby empowered as follows, that is to say :-

- 1. To use the registered name of the company, adding thereto "Registered," and also,
- 2. To have a common seal (with power to break, alter, and change the same from time to time), but on which must be inscribed the name of the company; and also,
- 3. To sue and be sued by their registered name in respect of any claim by or upon the company upon or by any person whether a member of the company or not, so long as any such claim may remain unsatisfied: and also.
- 4. To enter into contracts for the execution of the works, and for the supply of the stores, or for any other necessary purpose of the company; and also,
- 5. To purchise and hold lands, tenements, and hereditaments in the name of the said company, or of the trustees or trustee thereof, for the purpose of occupying the same as a place or places of business of the said company, and also (but nevertheless with a license general or special for that purpose to be granted by the committee of the Privy Council for trade first had and obtained) such other lands, tenements, and hereditaments as the nature of the business of the company may require; and also,
  - 6. To issue certificates of shares; and also,
- 7. To receive instalments from subscribers in respect of the amount of any shares not paid up; and also,
- 8. To borrow or raise money within the limitations prescribed by any special authority; and also,
- 9. To declare dividends out of the profits of the concern; and
- 10. To hold general meetings periodically, and extraordinary meetings upon being duly summoned for that purpose; and also,
- 11. To make from time to time, at some general meeting of shareholders specially summoned for the purpose, bye-laws for the regulation of the shareholders, members, directors and officers of the company, such bye-laws not being repugnant to or inconsistent

Costs.

Security for with the provisions of this Act, or of the deed of settlement of the company; and also,

> 12. To perform all other acts necessary for carrying into effect the purposes of such company, and in all respects as other partnerships are entitled to do.

#### SECTION VI.

# Persons residing out of the Jurisdiction.

May sue, unless alien enemies or resiemy's country without license.

THE rule that all persons, not lying under the disabilities after pointed out, are entitled to maintain a suit as plaintiffs in the Court dents in an en- of Chancery, is not affected by the circumstance of their being resident out of the jurisdiction of the Court, unless they be alien enemies, or are resident in the territory of an enemy without a license or authority from the government here (1)

But will be ordered to give security for costs.

In order, however, to prevent the defendant from being defeated of his right to costs, it is a rule, that if the plaintiff in a suit is resident abroad, the Court will, on application of the defendant, order him to give security for the costs of the suit, and in the mean time

(1) Story Eq. Pl. § § 51, 52, 53, 54. An alien enemy, residing in his own country, cannot prosecute a suit in the courts of the United States. Mumford v. Mumford, 1 Gallison, 366. See Bradwell v. Weeks, 1 John. Ch. 208; Crawford v. Wm. Penn, 1 Peters,

C. C. 106; Wilcox v. Henry, 1 Dallas, 69; Bell v. Chapman, 10 John. 183.

A plea, that the plaintiff was an alien enemy, is sufficiently answered by a treaty of peace made after the plea was filed. Johnson v. Harrison, 6 Litt. 226. The Court will notice the fact, though the plaintiff do not reply Litt. 226. The Court will notice the fact, though the plaintiff do not reply it. Ib. Treaties with foreign nations are part of the law of the land, of which the courts are bound to take notice. Baby v. Dubois, 1 Blackf. 255. If the plaintiff becomes an alien enemy after the commencement of the suit the defendant may plead it. Bell v. Chapman, 10 John. 183. The effect of

the plea of alien enemy, being but a temporary disability of the plaintiff, is not to defeat the process entirely, but to suspend it. Hutchinson v. Brock, 11 Mass. 119; Parkinson v. Wentworth, 11 Mass. 26; Levine v. Taylor, 12 Mass. 8; Hamersley v. Lambert, 2 John. Ch. 508; Story Eq. Pl. § 54.

In many cases, an alien enemy is entitled even to sue for his own rights, as

when he is permitted to remain in the country, or is brought here as a prisoner of war. He is recognised in our Courts in his character of executor; and in all cases his property is protected and held in trust for him until the return of peace. Bradwell v. Weeks, 1 John. Ch. 206; Bell v. Chapman, 10 John. 183; Clarke v. Morey, 10 John. 69; Hutchinson v. Brock, 11 Mass. 119; Parkinson v. Wentworth, 11 Mass. 26; Russell v. Skipwith, 6 Binney, direct all proceedings to be stayed (y) (1). In one case it was Security for decided, that in default of the plaintiff giving security for costs, his bill should be dismissed (2) (2); but it seems doubtful whether this practice would now be adopted (a). At Common Law the order would be to stay proceedings, and not that judgment should be entered for the defendant.

Costs.

It has been held in Ireland (b), that notwithstanding the 41 Geo. III. c. 93, s. 5, by which an attachment is given in England to enforce an order or decree made in Ireland for the payment of money, a plaintiff residing in England must on filing a bill in Ireland, give security for costs (c); and although the same Act applies to persons who are resident in Ireland commencing suits in England, it has been decided in the English Courts, that where a plaintiff resident in Ireland files a bill here, he must also give security (d). It has likewise been held, that a person resident in Scotland must in like manner give security for costs (e) (3).

Where there are co-plaintiffs resident in England, the Court will Not required not make an order that other plaintiffs who are abroad, shall give co-plaintiffs in security for costs (f) (4); and where the plaintiff is abroad as a England, nor land or sea officer in the service of her Majesty, he will not be where plaintiff is an officer, or ordered to give security (g); and so, where he is resident abroad ambassador, or upon public service, as an ambassador or consul, he cannot be resident abroad on public sercalled upon to give security (5); but peers of the realm, although vice.

(y) Fox v. Blew, 5 Mad. 148.

(z) Camac v. Grant, 1 Sim. 348.
(a) Cliffe v. Wilkinson, 4 Sim. 124; Lautour v. Holcombe, 1 Ph. 264.

(b) Moloney v. Smith, 1 M'Clel. &

(c) Mullett v. Christmas, 2 Ball & B. 422; vide stiam Stackpole v. Callaghan, 1 Ball & B. 566

(d) Hill v. Reardan, Mad. & Geld.

46; Moloney v. Smith, 1 M'Clel. & Y. 213.

(e) Ker v. Duchess of Munster, Bunb. 35.

(f) Winthrop v. Roy. Exch. Ass. Company, 1 Dick. 282; Walker v. Easterby, 6 Ves. 612.
(g) Evelyn v. Chippendale, 9 Sim. 497; Colebrooke v. Jones, 1 Dick.

154.

(2) Breeding v. Finley, 1 Dana, 477; Massey v. Gillelan, 1 Paige, 644; Bridges v. Canfield, 2 Edwards, 217.

⁽¹⁾ Unless the non-resident plaintiff sues as executor or administrator, in which case the defendant cannot compel security for costs. Goodrich v. Pendleton, 3 John. Ch. 520; Cathcart v. Hewson, 1 Hayes, 173. Especially after plea. 3 John. Ch. 520.

Bridges v. Canfield, 2 Edwards, 217.

(3) In Massachusetts all bills in Equity, in which the plaintiff is not an inhabitant of the State, must, before the entry thereof, be indorsed by some sufficient person, who is an inhabitant of the State. Rev. Stat. ch. 90, § 10.

(4) Orr v. Bowles, 1 Hodges, 23; Doe v. Roe, 1 Hodges, 315; Green v. Charnock, 1 Sumner's Vesey, 396, and note (a); Gilbert v. Gilbert, 2 Paige, 603; Burgess v. Gregory, 1 Edwards, 439.

No indorser is required in Massachusetts, where any one of two or more joint-plaintiffs is an inhabitant of the State. Rev. Stat. ch. 90, § 10.

(5) Green v. Charnock, 1 Sumner's Vesey, 396, note (a): Stanley v.

⁽⁵⁾ Green v. Charnock, 1 Sumner's Vesey, 396, note (a); Stanley v. Hume, 1 Hogan, 12.

Security for Costs.

Peers of the realm must give security.

Absence of plaintiff must appear either by the bill or upon affidavit, and must be for the purpose of residing abroad.

Application for security must be made before answer.

they are privileged from personal arrest, must, if they reside abroad, give security for costs, for although such costs cannot be recovered by personal process, they may by other process, if the plaintiff is resident in this country (k). And it may be stated as a general rule, that wherever a plaintiff is out of the jurisdiction, the defendant is entitled to security for costs, unless it is distinctly shown that the plaintiff is exempted from his liability (i).

A plaintiff cannot be compelled to give security for costs, unless he himself states upon his bill that he is resident out of the jurisdiction, or unless the fact is established by affidavit; and it seems that the mere circumstance of his having gone abroad, will not be a sufficient ground on which to compel him to give security, unless it is stated either by the plaintiff himself, or upon affidavit, that he is gone abroad for the purpose of residing there (k) (1).

In order to entitle a defendant to require security for costs from a plaintiff, he must make his application at the earliest possible time after the fact has come to his knowledge, and before he takes any further step in the cause; therefore, where the fact of the plaintiff being resident abroad appears upon the bill, he must make his motion before he puts in his answer, or applies for time, either of which acts will be considered as a waiver of his right to the security (I) (2).

If the plaintiff is not described in the bill as resident abroad, and

(A) Lord Aldborough v. Burton, 2 M. & K. 401.

(i) Lillie v. Lillie, 2 M. & K. 404.

(k) Green v. Charnock, 3 Bro. C.
 C. 371; 2 Cox, 284, S. C.; 1 Ves. J.

396, S. C.; Hoby v. Hitchcock, 5 Ves. 699.

(l) Meliorucchy v. Meliorucchy, 2 Ves. 24; 1 Dick. 147, S. C.; Craig v. Bolton, 2 Bro. C. C. 609; Anon. 10 Ves. 287.

Security for costs will be required from an officer in the service of the

East India Company. Powell v. Bernard, 1 Hogan, 144.

(1) It is well settled, that to constitute one a resident, his residence must be of a fixed and permanent and not of a mere temporary character. Graham, Prac. 505; 1 Smith, Ch. Pr. (2nd Am. ed.) 555, note (s). An absence of eighteen months will not be regarded as merely temporary. Foss v. Wagner, 2 Dowl. P. 6, 499. Even though it is sworn, that the party is soon expected. Wright v. Black, 2 Wend. 258; Gilbert v. Gilbert, 2 Paige, 603.

(2) Goodrich v. Pendleton, 3 John. Ch. 520; Prior v. White, 2 Moll. 361; Eardy v. Headford, 2 Moll. 464. In Massachusetts, though a writ, sued out by the plaintiff, who is not an inhabitant of the State, is not indersed as is

⁽²⁾ Goodrich v. Pendleton, 3 John. Ch. 520; Prior v. White, 2 Moll. 361; Eardy v. Headford, 2 Moll. 464. In Massachusetts, though a writ, sued out by the plaintiff, who is not an inhabitant of the State, is not indorsed as is required by Rev. Stat. ch. 90, § 10, yet the defendant must make the objection at the first term or he will be held to have waived it. Carpenter v. Aldrich, 3 Metcalf, 58. See Whiting v. Hollister, 2 Mass. 102; Gilbert v. Nantucket Bank, 5 Mass. 98; Clapp v. Balch, 3 Greenl. 216. The practice in New York, under the act of that State, authorising the defendant to require security for costs, allows the application to be made at any stage of the cause, if the plaintiff was a non-resident at the commencement of the suit, and continues so. Burgess v. Gregory, 1 Edwards, 449.

the defendant does not become apprised of that fact before he puts Security for in his answer, he may make the application after answer; if, however, he takes any material step in the cause after he has notice, Material step he cannot then apply. In Macon v. Gardiner (m), the plaintiff was in the cause, after notice. described in the original bill as late of the West Indies, but then will deprive of the City of London, and the defendant having answered, filed a defendant of his right to cross bill against the plaintiff; exceptions, however, were taken to make applicathe answer, to which the defendant submitted, and put in a further tion for. answer, and then applied to the Court that the plaintiff in the original bill might give security for costs, alleging in his affidavit, that upon application to the plaintiff's solicitor in the original suit to appear for him to the cross bill, he discovered for the first time that the plaintiff did not reside in London, as alleged in the bill, but in Ireland. To this it was answered (and so it appeared), that the defendant had in his cross bill stated the plaintiff to be resident in Ireland, and after that had answered the exceptions to his answer to the original bill, and had thereby taken a step in the cause after it was evident that he had notice of the plaintiff's being out of the jurisdiction, and Lord Eldon held, that the defendant had thereby precluded himself from asking for security for costs, and therefore refused the motion. Ex parte Seidler (n) was a petition under an Act of Parliament, authorizing the Court to make an order in a summary manner upon petition. The petitioner being out of the jurisdiction of the Court, and the respondent having answered the affidavits in support of the petition, the question was whether he had thereby lost his right to require the petitioner to give security for costs; the V. C. of England ruled that he had not, but that he might make the application on the petition coming on to be heard.

In Dyott v. Dyott (o), where the defendant had sworn to his Application for answer before he had notice of the fact of the plaintiff being resi- cannot be dent abroad, but in consequence of some delay in the six clerks' answer, office the answer was not filed till after the defendant had been in-though sworn formed of the plaintiff's residence; a motion that the plaintiff might give security for costs was considered too late, although the defendant himself was not privy to or aware of the delay which had taken place in filing his answer.

If a plaintiff after filing a bill, leave the kingdom for the pur- When plaintiff pose of settling, and do actually take up his residence in foreign goes abroad after bill filed.

(m) 2 Bro. C. C. Ed. Belt, 609, no-

(n) 12 Sim. 106.

(o) 1 Mad. 187.

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Security for Costs.

Not ordered, unless plaintiff gone to settle or reside abroad.

parts, it is in any stage of the cause ground for an order that he shall give security for costs (p) (1). It is presumed, however, that such application ought to be made as early as possible after the defendant has become apprised of the fact; and it is not enough to support such an application to swear that the plaintiff has merely gone abroad, but the affidavit should go on to say further, that he is gone to settle abroad (2). In Weeks v. Cole (q), an application was made by the defendant, after answer, that the proceedings might be stayed until the plaintiff gave security for costs, on an affidavit that the plaintiff who, when the bill was filed was resident in London, had, since the answer was put in, entirely abandoned the country and gone to reside in the Isle of Man; and Lord Eldon made the order, observing, however, that the plaintiff ought to have an opportunity of answering the affidavit, the propriety of which suggestion is evident from the case of White v. Greathead (r), where an order for the plaintiff to give security for costs after answer, was refused in consequence of an affidavit which had been filed by the plaintiff's solicitor, stating that the plaintiff had gone to the West Indies merely for the purpose of arranging his affairs, and that he had informed the deponent that he intended soon to return to this country, where he had left his family.

Plaintiff must be absolutely gone. To entitle a defendant to an order that the plaintiff may give security for costs, it is necessary that the plaintiff should absolutely be gone abroad, the mere intention to go will not be sufficient (s) (3); in a case, however, where the plaintiff, who was an alien enemy, was under confinement preparatory to his removal out of the country, upon a warrant by the Secretary of State under the Alien Act, the proceedings were stayed until he gave security for costs, although he was not actually gone out of the

Where under the Alien Act.

(p) Anon. 2 Dick. 776; see also
Busk v. Beetham, 2 Beav. 537.
(q) Ibid. 14 Ves. 518.

(r) 15 Ves. 2.
(s) Adams v. Colethurst, 2 Anst.
552.

⁽¹⁾ In Massachusetts, if any plaintiff in a bill in Equity, or suit at law, shall, after the commencement of his suit, remove from the State, he shall, on the motion of the defendant, or of any other party to the suit, be required to procure a sufficient inderser. Rev. Stat. ch. 90, § 10.

to procure a sumcient indorser. Rev. Stat. cn. 50, 9 10.

(2) See 1 Smith Ch. Pr. (2d Am. ed.) 555; Ayckbourn's Ch. Pr. (Lond. ed. 1844,) 217, 218; Green v. Charnock, 3 Bro. C. C. (Perkins's ed.) 371, notes; 1 Hoff. Ch. Pr. 200; Phillips v. Thornton, 10 Legal Obs. 134; Hoby v. Hitchcock, 5 Sumner's Vesey, 699, and note (a); Ford v. Boucher, 1 Hodges, 58.

Hodges, 58.
(3) Willis v. Garbutt, 1 Young & Jer. 511; 1 Barbour Ch. Pr. 103; Hoby Hitchcock. 5 Sumner's Vesey, 699.

country (t). In proceedings at Common Law, where after the Security for commencement of an action, and after issue joined, the plaintiff has been convicted of felony and ordered to be transported, the Or under sen-Courts have ordered security to be given for costs, as well retro-tence of transspective as prospective (u) (1); and it is presumed that Courts of felony. Equity will follow the rule at Law; where, however, the plaintiff had not been convicted of felony, but only of a misdemeanor un- For a misdeder the 52 Geo. III. c. 130, s. 2, for poaching, for which he was meanor. sentenced to seven years' transportation, and it was admitted that he had not sailed for the place of transportation, but was in a penitentiary place of confinement, the Vice-Chancellor refused a motion for stay of proceedings till the plaintiff had given security for costs (x).

From analogy to the course adopted where the plaintiff is resi- Ambassador's dent out of the jurisdiction, the Court will, upon application, re- servants. strain an ambassador's servant, whose person is privileged from arrest by the 7 Ann. c. 12, from proceeding with his suit until he has given security for costs (y).

By the old practice, 40l. was the amount of security required to answer costs by any plaintiff who was out of the jurisdiction of the Court, but this sum has now been increased to 100l. (2) (2). In an anonymous case (a), the V. C. of England ruled, that where a person out of the jurisdiction of the Court presents a petition to have his solicitor's bill taxed, he must give security, to be approved of by the Master, for the costs of the petition, and also for the balance that may be found due from him, on the taxation.

The manner of giving the security it as follows: - the plaintiff In what mangives notice of the name and description of the person intended ner given. to become security, to the defendant's solicitor, who will return an answer whether he approves the security or not, and if he does

(t) Seilaz v. Hanson, 5 Ves. 261. (a) Harvey v. Jacob, 1 B. & Ald. 150.

(x) Baddeley v. Harding, Mad. & Gel. 214.

(y) Anon. Mos. 175; Goodwin v. Archer, 2 P. Wms. 452; Adderly v. Smith, 1 Dick. 355.

(z) 40 Order, April, 1828. (a) 12 Sim. 262; see also in re Pasmore, 1 Beav. 94.

 Dunn t. M'Evoy, 1 Hogan, 355.
 The New York Statute requires the security to be given in the form of a bond, with one or more sufficient sureties, in a penalty of at least \$250. The Court under the same statute has authority to require bonds in a larger sum, if it thinks proper to do so. 2 Rev. Stat. N. Y. 620, § 4.

The Court may either fix the amount itself or refer it to a master. Fulton v. Rosevelt, 1 Paige, 179; Massey v. Gillelan, 1 Paige, 644. See Gilbert v. Gilbert, 2 Paige, 603. Costa.

Security for not object thereto the bond is consequently given. If he requires two persons to enter into the bond, the plaintiff must comply with this requisition. If the defendant's solicitor objects to the persons offered as security, which it appears he has a right to do (b), the plaintiff must find others, or the persons already offered must justify by affidavit in 2001. (c). In the case of Panton v. Labertouche (d), it was decided that a solicitor ought not to be surety for his client.

Form of bond.

The bond is given to the clerk of records and writs in whose division the cause is, and is prepared by the plaintiff's solicitor (e). in the following form: -

"Know all men by these presents, that we, A. B. of the city of London, merchant, and C. D. of the same place, merchant, are held and firmly bound to Esq., in the penal sum of of good and lawful money of Great Britain: for which payment to be well and faithfully made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals. &c.

Condition.

"Whereas, L. R., plaintiff, has lately exhibited his bill of complaint in her Majesty's High Court of Chancery against R. S., defendant, touching the matters therein contained. Now the condition of this obligation is such, that if the above bounden A. B. and C. D., or either of them, their heirs, executors or administrators do, and shall well and truly pay or cause to be paid, all such costs as the said Court shall think fit to award to the defendant on the hearing of the said cause or otherwise, then this obligation to be void, or else to remain in full force and virtue (f).

"Sealed and delivered, &c."

Where there are several defendants.

If there are several defendants, and one only obtains the order. yet the security must be given to answer the costs of all. Originally, where there were several defendants only, one bond was given, which was deposited with one of the six clerks on behalf of

- (b) Cliffe v. Wilkinson, 4 Sim. 122. Turner & V. 332.
- (d) 1 Ph. 265.
- (e) Order, 6th October, 1842. (f) From a note to Mr. Beames's Treatise upon Costs, (p. 359, No. 9,) it appears that in Osborne v. Bartlett, the Court of Exchequer held, that where a defendant had become a

bankrupt, and his assignees were made parties by supplemental bill, they were entitled to call for a fresh security, because the form of the obligation, although entered into with the officer of the Court, is merely to pay the costs of the defendant who is named.

all parties. Afterwards, the bond was deposited, not with a six clerk, but with a clerk in court, and as the clerk in court of one party had no more right to hold the bond than the clerk in court of another party, it became the practice for every clerk in court of a defendant to call for a separate bond; since the abolition of the office of the six clerks, there has been no decision upon the practice, consequently it may be considered doubtful whether every defendant, or set of defendants, appearing by separate solicitors, may require a bond, or whether one bond on behalf of all the defendants should be deposited with the clerk of records and writs; but whatever number of bonds may be given, they all form a security for one sum only (g).

If the surety for costs should become bankrupt, the Court will order the proceedings to be stayed until the plaintiff shall have found a new surety (h).

In Ker v. The Duchess of Munster (i), it is said that the Court Money alof Exchequer refused to allow the plaintiff to pay 40l. into Court lowed to be deposited in instead of giving security for that sum, but in Cliffe v. Wilkin-Court in lieu son (k), where the plaintiff offered, instead of giving security, to of security. pay in 1001., pursuant to the new orders; the V. C. of England said, that if he would increase the sum offered, so as to bear the expense of bringing the money into Court and getting it out again, he would grant the motion, which he accordingly did by making the order for the payment of 1201, into Court (1).

#### SECTION VII.

### Of Paupers.

Ir had been before stated to be a general rule, subject to very Persons in infew exceptions, that there is no sort or condition of persons who digent circumstances may may not sue in the Court of Chancery. Amongst the exceptions sue, to this rule those who are in indigent circumstances are not included, and any party, however poor he may be, being in other respects competent, has the same right as another to commence

⁽g) Lowndes v. Robertson, 4 Mad. 15. In the report of this case Sir J. Leach, V. C., is reported to have said, that it was desirable the old practice should be restored.

⁽h) Lautour v. Holcombe, 1 Ph.

^{262;} see also Veitch v. Irving, 11 Sim. 122.

⁽i) Bunb. 35.

⁽k) 4 Sim. 122.(l) For more on the subject of security for costs, vide post, Alien, -Bill, - Security for Costs.

Of suing in forma pauperis. and are not required to give security for costs.

May be prochein amys of infants.

But not of femes covert.

Church wardens may join with a pauper. proceedings in the Court of Chancery for the assertion of his claims, and that without being required to give any security for the payment of costs to the opposite party, in case he fails in his suit. Lord Eldon, in Ogilvie v. Hearn (m), said that the Court would not require security for costs from any man in England, upon any representation of his circumstances, and this liberality seems to be extended to the case of the prochein amy of infants (1); indeed any other rule would amount to a denial of justice to the children of poor persons, who might become entitled to property, and yet be precluded from asserting their right because their father, who is the proper person to be their prochein amy, by reason of his circumstances could not be so, without giving security for costs, which he might not be able to procure (n). spect to the prochein amy of a feme covert; there is in this respect a great difference in the rule, for it has been held that the prochein amy of a married woman must be a person of substance (o) (2), because a married woman and an infant are differently circumstanced, as the infant cannot select his own prochein amy, but must rely upon the good offices of those who are nearest to him in connexion, or otherwise his rights might go unasserted, but the married woman has the power of selecting; she is therefore required to select for her prochein amy a person who, if her claim should turn out to be unfounded, can pay to the defendant the costs of the proceeding (3).

It has been said that churchwardens may join in a suit with a poor person who is chargeable to the parish (p): this must be upon the principle, that as the person receives his support from the parish, the parish in return have a right to benefit by whatever property the pauper may acquire during the time he is dependant upon them, to reimburse them for the outlay.

It does not appear, however, that any suit of this description has been instituted at least for a great many years past. Indeed the

(m) 11 Ves. 600. (o) Anon. 1 Atk. 570; vide post, (n) Vide Squirrel v. Squirrel, 2 Femes Covert Plaintiffs. Dick. 765; and post, Infant Plaintiffs. (p) 1 Eq. Ca. Ab. 71.

⁽¹⁾ The next friend of a minor plaintiff cannot be compelled to give service for costs. St. John v. Earl of Besborough, 1 Hogan, 41. The con-(2) See Lawrence v. Lawrence, 3 Paige, 267; Fulton v. Rosevelt, 1 Paige, 180.

⁽³⁾ Upon a proper application, a wife may be permitted to file a bill against her husband, for a separation, in forma pauperis. But this will not be done, until the Court has ascertained, by the report of a Master, that she has probable cause for filing such a bill. Robertson v. Robertson, 3 Paige, 387.

legislature has provided means by which all persons, who are not Of suing inforworth a sum of 5l. beyond the subject-matter in litigation, may ma pauperis. be enabled to resort without expense to the ordinary tribunals, and the Courts of Equity have adopted the same means into their practice (1).

In consequence of the provision of stat. 11 Hen. VII. c. 12, the Practice at practice of the Courts of Law has been to admit all persons to sue Law. in forma pauperis, who could swear that they were not worth 5l. after all their debts are paid, except their wearing apparel and the subject-matter of the suit; and the practice of the Courts of Law in this respect has been adopted by Courts of Equity, although Adopted in persons suing in these Courts do not come within the provisions of Equity. the Act of Parliament above referred to.

The privilege of suing as paupers extends only to persons suing Executors or in their own rights, and not to executors or administrators (q). administrators In a modern case, however, where the party sustained the mixed paupers. character of executor and legatee, Lord Eldon held that it formed Secus. where an exception to the general rule, but to prevent any undue practice plaintiff susin suing in forma pauperis, and under color of that privilege to character of obtain dives costs, his lordship thought that a special order was legatee and necessary to enable the pauper to proceed in that character as to executor. the legacy (r). And Sir J. L. Knight Bruce, V. C., made an exception to the strict application of the rule, by allowing an executor to proceed in forma pauperis for the single purpose of clearing a contempt incurred in the cause (s).

tains a mixed

It is said that a person filling the character of prochein amy can- A prochein not sue in forma pauperis, although, as we have seen before, the any cannot poverty of a prochein amy of an infant is no ground for dismiss- sue as pauper. ing him (t) (2).

(q) Paradise v. Sheppard, 1 Dick. 136; Oldfield v. Cobbett, 3 Beav. 432; Anon. 2 Moll. 338.

1824, cited 1 Turner & Venables, 518. (s) Oldfield v. Cobbett, 3 Y. & C.

(r) Thompson v. Thompson, Hill. (t) Anon. 1 Ves. J. 410.

(1) Story Eq. Pl. § 50; 1 Smith Ch. Pr. (2d Am. ed.) 550 et seq.; 1 Hoff. Ch. Pr. 67 et seq. A party must be an object of charity, in order to be entitled to prosecute in forma pauperis. Isnard v. Cazeaux, 1 Paige, 39. Applications for this privilege are not encouraged. Ib.

It seems to be doubtful, in New York, whether in any case, a party can defend in forma pauperis. This doubt grows out of the peculiar phraseology of the Statute in that State. Brown v. Story, 1 Paige, 588. But New Lerrey the privilege of defending in forma pauperis granted in a proper

Jersey the privilege of defending in forms pauperis is granted in a proper case, although the act of assembly extends in terms only to plaintiffs. Pickle v. Pickle, Halst. N. J. Dig. 177.

(2) See Robertson v. Robertson, 3 Paige, 387. In New York, it has been held, that an infant, who has no means of indemnifying a responsible person for costs, will be permitted to sue by his next friend in forma pauperis. The

Of suing in forma pauper-

Bankrupt may

petition in forma pauperis. Party examined pro interesse suo. Plaintiff may be admitted to sue in forma pauperis at any

time.

It has been held that a bankrupt may be admitted to petition against his commission in forma pauperis (u); and where a person was ordered to be examined pro interesse suo, respecting a claim set up by her to some lands taken under a sequestration, but was unable from poverty to make out or support her right, liberty was given to her to do so in forma pauperis (x).

A plaintiff may be admitted to sue as a pauper upon the usual affidavit, at any time either before or after the commencement of the suit, but in the latter case he will be liable to all the costs incurred before his admission, and may be attached for the non-payment of costs previously ordered to be paid (y) (1).

The question whether, after a dismissal of a former suit, a plaintiff can be admitted to sue again for the same matter in forma pauperis without paying the costs of the first suit, has been much discussed. In a case in Vernon (z), a plaintiff was permitted to file a bill of review, without payment of the costs of the former suit, amounting to 150%, upon his making oath that he was not worth 401. besides the matter in question in that and another suit between the same parties. That case, however, appears to have been an extreme case, and the instance cited by Lord Eldon in his judgment in Corbett v. Corbett (a) shows, that Courts of Law, whose decisions are upon this point applicable by analogy to Courts of Equity, would, after judgment of nonsuit against a plaintiff, stay a second action by the same plaintiff suing as a pauper, till the costs of the former action had been paid (2).

It seems, however, that it is no ground of objection to a party suing in forma pauperis, that the suit is a second suit for the same matter as a former suit, in which the plaintiff had likewise sued as a pauper, unless the second suit can be justly characterized as vexatious (b); and in Corbett v. Corbett (c), Lord Eldon appears to have held, that the circumstance of the plaintiff having conducted himself vexatiously in the first suit would not be a ground for dispaupering him in the second; and that the fact of his hav-

(u) Ex parte Northam, 2 V. & B. 124.

(z) Fitton v. Earl Macclesfield, 1 Vern. 264.

(z) James v. Dore, 2 Dick. 788. (y) Anon. Mos. 66; Davenport, v. (a) 16 Ves. 410. (b) Wild v. Hobson, 2 Ves. & B. 112.

Davenport, 1 Ph. 24; see however Bennett v. Chudleigh, 2 Y. & C. 164. (c) 16 Ves. 407.

Court will, however, in the first instance, see that there is probable cause for the proceeding, and will appoint a proper person as prochein ami. Fulton v. Rosevelt, 1 Paige, 178.

Brown v. Story, 1 Paige, 588.
 Proceedings in a suit by a pauper were stayed until the costs of a previous suit in Chancery were paid. Colvert v. Rooth, 4 Younge & Coll. 450.

Doubtful whether after dismissal of former suit for the same mat-

ing been supplied with money by a charitable subscription, for the Of suing in purpose of assisting him in the conduct of his suit, although it forma paupermight afford ground for impeachment at Common Law, was no ground upon which he could deprive him of the right to sue as a pauper in Equity.

In Taylor v. Bouchier (d), it it stated by Mr. Dickens to have Party agbeen said that a pauper could not appeal, and that the proposition grieved may was assented to by the bar; but in Bland v. Lamb (e), Lord Eldon ma pauperis. said that it was a very singular proposition, and that he could not see why, because a party was poor, the Court should not set itself right, and made an order that the appellant should be at liberty to prosecute the appeal in forma pauperis (f)(1).

Where pauper plaintiffs are guilty of vexatious conduct in the Consequences suit, the Court will order them to be dispaupered; and an order of vexatious to that effect was actually made by the Vice-Chancellor upon mo-conduct. tion in Wagner v. Mears (g) (2).

And in Pearson v. Belchier (h) Lord Loughborough said, that a pauper is liable to be committed if he files an improper bill, as otherwise he might be guilty of great oppression.

In order to be admitted to sue in forma pauperis the plaintiff Petition for admust present a petition to the Master of the Rolls containing a mission. short statement of his case (and of the proceedings, if any, which have been had in the cause), and praying to be admitted to sue in forma pauperis, and that a counsel and a solicitor may be assigned to him.

This petition must be under-written by a certificate signed by Certificate of counsel, "that he conceives the plaintiff has just cause to be re-counsel. lieved touching the matter of the petition for which he had exhibited his bill "(i); and there must also be annexed to the petition an affidavit sworn by the plaintiff before a Master that he is Affidavit. not worth in all the world the sum of 51., after payment of his just debts, his wearing apparel and the matters in question in the cause only excepted (k).

(d) 2 Dick. 504. (e) 2 Jac. & W. 402. f) Vide Fitton v. Earl Macclesfield, supra.

³ Sim. 127. (h) 4 Ves. 630; and Har. 380.

i) Har. 437. (k) Ibid. 389.

⁽¹⁾ In Bolton v. Gardner, 3 Paige, 273, it was held, that an appellant is not allowed to prosecute an appeal as a poor person, but he must give security for costs.

⁽²⁾ In Murphy v. Oldis, 1 Hogan, 219, it was held, that a party will not be deprived of the privilege of defending himself in forma pauperis, on account of his misconduct.

Of suing in forma pauperis.

Must be sworn by the party

himself.

It is to be observed, that this affidavit must be sworn by the party himself; and that in a case in which it afterwards appeared that the affidavit had been sworn by a third person, the party was dispaupered (1).

The petition, after it has been certified, is then, with the affidavit annexed, to be presented to the Master of Rolls, who, if he sees no cause against it, underwrites an order by which the petitioner is admitted to sue in forma pauperis, and a counsel and solicitor are assigned to act upon his behalf (m).

The order should be served upon the opposite party as soon as possible, for in the case of Ballard v. Catling (n), Lord Langdale decided that a plaintiff admitted to sue in forma pauperis should pay dives costs to the defendant in respect of a step in the cause taken before service of the order (1). And in the case of Church v. Marsh (o), Sir J. Wigram, V. C., admitted the propriety of the practice, although he held that there was a discretion in the Court in such cases, and that the order to sue in forma pauperis was not necessarily inoperative in all cases until service.

Consequences of admission.

After admittance, no fee, profit or reward (except paupers' fees) is to be taken of the pauper by any counsel or attorney for the despatch of business whilst it depends in Court, and he continues in forma pauperis; nor shall any contract or agreement be made for any recompense or reward afterwards; and if any person offending herein shall be discovered unto the Court, he shall undergo the displeasure of the Court, and such farther punishment as the Court shall think fit to inflict; and if any pauper offend herein, he is to be dispaupered, and never again be admitted in the same suit in forma pauperis (p).

If it be made to appear to the Court that any pauper has sold or contracted for, the benefit of his suit, or any part thereof, while the same is depending, such cause shall be thenceforth wholly dismissed, and never again retained (q). Although no fees strictly so called can be taken of a pauper, yet the six clerks could make him pay for the labor of writing after the rate of two pence per sheet (r), and it is presumed the solicitor who now acts in the place of the six clerk may make a similar charge.

- (l) Wilkinson v. Belcher, 2 Bro. C. C. 272.
  - (m) Har. 389. (n) 2 Keen, 606.

- (o) 2 Hare, 652.
- (p) Ord. Ed. Beam. 218.(q) Ord. Ed. Beam. 216.
- (r) Har. 389.

⁽¹⁾ Where an order had been obtained, on an exparte application, that the plaintiff be permitted to prosecute in forma pauperis, the same was vacated with costs. Isnard v. Cazeaux, 1 Paige, 39.

The counsel or attorney assigned by the Court to assist a per- Of suing in son in forma pauperis, either to prosecute or defend, may not refuse so to do, unless he satisfies the Court who granted the admittance that he has some good reason for his forbearance (s) (1).

Counsel and

It was formerly necessary, that all notices of motions on behalf assigned, may of a person suing in forma pauperis should be signed by his clerk not refuse. in Court (t), and since the abolition of the office of six clerks, behalf of pau-Sir J. L. Knight Bruce, V. C., has declined to hear a petition pers. presented on behalf of a pauper in consequence of its not having been signed either by the clerk of records and writs, or by a solicitor of the Court (u).

When the counsel assigned makes a motion on behalf of a pau- Motions on beper he ought to have the order of admittance with him, and to half of paumake such motion before he makes any other; and if the registrar shall find that the person on whose behalf the motion was made was not admitted to sue in forma pauperis, he is not, according to the order of the Court, to draw up the next motion made by such counsel, who is to lose the fruit of such motion, in respect of his abuse of the order of the Court (x).

A counsel making a motion on behalf of a person admitted to sue in forma pauperis, may afterwards make as many motions as he might, had he not made it (y).

It is stated in the Practical Register (z) that a plaintiff suing Of dismissal of in forma pauperis shall not amend his bill by leaving out defen- his own bill by dants without paying their costs (2); but upon turning to the case referred to in the margin (a), in support of this dictum, it does not bear out the assertion to the extent to which it is carried in the Register. The case was that of a plaintiff who was admitted to sue in forma pauperis after he had filed his bill, and then made an application for leave to amend by striking out some of the defendants, which was objected to on the ground that, having been

⁽s) Ord. Ed. Beam. 216. (t) Perry v. Walker, 4 Beav. 452.

⁽y) Curs. Canc. 489.(z) Ed. Wyatt, 321.

⁽a) Perry v. Walker, 2 Y. & C. 655; and 16 Order, Oct. 1842.

⁽a) Wilkinson v. Belcher, 2 Bro.

⁽z) Ord. Ed. Beam. 217.

⁽¹⁾ See Lewis v. Kennett, 3 Russ. 466. When a pauper has a decree for debt and costs, his solicitor has a lien on the sum recovered for dives costs, though the fund is deficient for the payment of the plaintiff's demand. Quin

v. Bodkin, 2 Hogan, 240.

A pauper's solicitor may be made to pay the costs of any irregular proceeding. Brown v. Dawson, 2 Hogan, 76.

(2) If a party suing in forma pauper amends his bill after answer, under the common order, it must be upon the payment of costs as in ordinary suits; and if he has a meritorious claim to amend without costs, he must apply to the Court by special motion upon affidavit and notice to the adverse party. Richardson v. Richardson, 5 Paige, 58.

ma pauperis.

Dismissal of

a pauper.

Of suing in for- made parties prior to the plaintiff's admission, they were entitled to their costs up to that time.

In Pearson v. Belchier (b), it is said that a motion was made on the part of the plaintiff in a pauper cause, to dismiss the bill against two of the defendants without costs; but that the Lord Chancellor ordered it to be made, on payment of costs. It appears, however, from the registrar's book, that the order for dismissal in that case was his own bill by drawn up without costs (c); and it is to be observed, that in Corbett v. Corbett (d), before referred to, the pauper's first bill had many years before been dismissed without costs, before hearing, although the cause had reached that stage, and that this very circumstance was relied upon as a ground for dispaupering him in the second suit, but was not considered as sufficient to induce the Court to make the order. It is also to be observed, that if a cause goes against a pauper at the hearing, he shall not pay costs to the defendant, but he may be punished personally, though such punishment is not very often inflicted (e).

> It seems to have been formerly considered, that where a plaintiff sues in forma pauperis, and has a decree in his favor with costs, he will only be entitled to such costs as he has been actually out of pocket (f)(1).

As to his right to receive costs.

In Scatchmer v. Foulkard (g), however, where a bill was brought in forma pauperis, to which the defendant put in a plea and demurrer, which were both overruled, and it was insisted that the plaintiff not having been put to costs, should have none, Lord Somers, after long debate, and inquiry of all the ancient counsel and clerks, who agreed that he should have costs, ordered him his costs like other suitors; for though he is at no costs, or but small costs, yet the counsel and clerks do not give their labor to the defendant, but to the pauper. The same principle appears to have been acted upon by Lord Somers, in Haulton v. Hagre (h), and was adopted by Lord Loughborough, C., and Lord Alvanley, M. R., in Wallop v. Warburton (i). In a subsequent case, before Lord Eldon (k), where a plaintiff sued in forma pauperis, and the answer was reported impertinent, the question arose whether the

The costs of a successful pauper in the discretion of the Court.

> (b) 3 Bro. C. C. 87. (c) Reg. Lib. 1789, B. fo. 524, entered Pearson v. Wolfe, 3 Bro. C. C. 87, Ed. Belt, n. 1.

(d) 16 Ves. 407. (e) Har. 391.

(f) Angell v. Smith, Prec. Cha. 219; 1 Dick. 427.

(g) 1 Eq. Ca. Ab. 125.
(h) Cited in Angell v. Smith, Prec. Cha. 220.

(i) 2 Cox, 409. (k) Rattray v. George, 16 Ves. 233.

⁽¹⁾ See Williams v. Wilkins, 3 John. Ch. 65.

plaintiff's costs in respect of the impertinence were to be taxed as Ofsuing in fordives costs, when, after reviewing the cases before cited, his Lordship said, that the result of all the authorities is, that the Court has a discretion in each case, and that in that case the proper order was that the Master should tax dives costs; to be paid into Court, and await the event of the cause in its further progress. The order accordingly was made for taxation of dives costs, but not for payment.

In the case of Church v. Marsh (1), Sir J. Wigram, V. C., said, "the rule of the Court as settled by the case of Rattray v. George (m), followed by Roberts v. Lloyd (n), and recognized though not followed in Stafford v. Higginbotham (o), is, that where the pauper succeeds, it is in the discretion of the Court, whether he shall receive pauper or dives costs" (1).

It was determined as long ago as the time of Tothill, that a Of scandal. pauper must pay the costs of scandal in his answer (p) (2).

As a party may be admitted in forma pauperis at any time dur- Of dispaupering the suit, so if at any time it is made to appear to the Court ing. that he is of such ability that he ought not to continue in forma pauperis, the Court will dispauper him (q); therefore, where it was shown to the Court that a pauper was in possession of the land in question, the Court ordered him to be dispaupered, though the defendant had a verdict at Law, and might take a writ of possession at any time (r), and in the case of Boddington v. Woodley (s), Lord Langdale, M. R., decided that an officer upon half pay (which is not alienable) cannot proceed in forma pauperis, notwithstanding he has taken the benefit of the Insolvent Act.

At common Law, if a pauper give notice of trial, and do not proceed or be otherwise guilty of improper conduct, the Court will

- (l) 2 Hare, 655.
- (m) 16 Ves. 232.
- (n) 2 Beav. 376.
- (o) 2 Keen, 147. (p) Rattray v. George, 16 Ves. 232.
- (q) Romilly v. Grint, 2 Beav. 186;
- Pract. Reg. 320.
- (r) Ibid. 321, vide Spencer v. Bryant, 11 Ves. 49.
- (s) 5 Beav. 555.

⁽¹⁾ Williams v. Wilkins, 3 John. Ch. 65. A plaintiff suing in forma pauperis, and recovering a legacy against executors, when there was no unreasonable delay on their part, ought not to recover dives costs, but only the actual expenses of the suit to be paid by the executors out of the assets. Williams v. Wilkins, 3 John. Ch. 65.

⁽²⁾ A party suing as a poor person is chargeable with the costs of setting aside his proceedings for irregularity, or of a contempt, (Murphy v. Oldis, 2 Moll. 475,) or of expunging impertment or scandalous matter, in the same manner as other suitors. Richardson v. Richardson, 5 Paige, 58. See Brown v. Dawson, 2 Hogan, 76, cited ante, 39.

Of suing in for- order him to be dispaupered (t); and it seems probable that in Courts of Equity, if a party who is admitted to sue in forma pauperis were to be guilty of vexatious delays, or to make improper motions, such as not appearing when the cause is called on, or moving to suppress depositions upon groundless objections, he would be dispaupered though the Court always proceeds very tenderly in such points (u) (1).

Where issue is directed.

Where an issue is directed out of Chancery in a pauper's suit, he must be admitted as a pauper in the Court in which the issue is to be tried, or otherwise he cannot proceed in it in forma pau-In a case, however, where the plaintiff, a pauper, claimed as heir at law, and the defendant claimed under a will and deed, which were disputed, the bill was retained, with liberty to the plaintiff to bring an action, and the tenants were ordered to pay the plaintiff 150% to enable him to go to trial (v).

(t) 1 Tidd. 89. (x) Gibson v. M'Carty, Ca. Temp. (u) Whitelocke v. Baker, 13 Ves. Lord Hardwicke, 311. (y) Perishal v. Squire, 1 Dick. 31.

⁽¹⁾ Wagner v. Mears, 3 Simons, 127; ante, 37; Steele v. Mott, 20 Wendell, 679.

## CHAPTER III.

#### PART I.

OF PERSONS WHO ARE ABSOLUTELY DISQUALIFIED FROM SUING IN EQUITY.

# SECTION I. — Of the different sorts of Disqualifications. '

THE general rule that all persons of whatever rank or condition, Exceptions to and whether they have a natural or only political character, are rule. capable of instituting suits in Equity, is liable, as has been stated, to few exceptions. What these exceptions are will be the subject of the present Chapter.

The disabilities by which a person may be prevented from su-Disqualificaing may be divided into two sorts; namely, such as are absolute, suing are eiand, during the time they last, effectually deprive the party ther of the right to assert his claim; and such as are qualified, and merely deprive him of the power of suing without the assistance of some other party to maintain the suit on his behalf. Of absolute, the first sort are the disabilities which arise from Alienage, Outlawry, Attainder, Bankruptcy and Insolvency; of the second sort or qualified. are those which arise from Infancy, Coverture, Idiocy and Lun-

To the first list of disabilities which disqualify a man from en- Absolute distertaining any suit in his own right, might formerly have been abilities. added excommunication and popish recusancy. But these disqualifications no longer exist, the first, except in certain cases, having Excommunibeen abolished by the statute 53 Geo. III. c. 127, the third sec-cations; tion of which Act directs, that in those cases in which excommu- 53 Geo. III. nication is to continue, no person pronounced or declared excom-c. 127. municate shall incur any civil penalty or incapacity whatever, save such imprisonment as the Court is thereby authorized to inflict. Popish recu-The disqualifiation arising from popish recusancy has been virtu-sancy; aboally, if not entirely, abolished by the 31 Geo. III. c. 32, by which Geo. III. c. 32. Papists and persons professing the popish religion, taking the oath and subscribing the declarations therein mentioned, are relieved

Absolute disabilities. from most of the penalties and disabilities to which they were then subject (1).

### SECTION II.

## Of Aliens.

In what cases they may sue;

WITH respect to aliens in general it is to be observed, that although by the old law no alien, whether friend or enemy, could sue in the Queen's Courts, yet the necessity of trade has discouraged and gradually done away with the too rigorous restraints and discouragements which formerly existed; and it is now clear, that for a mere personal demand, an alien born, provided he be not an alien enemy, may sue in the Courts of this country (2).

This rule is clearly recognized in Ramkissenseat v. Barker (a),

for personal demands.

where a bill was filed, against executors for an account, by a plaintiff who had been employed by the testator in India as his banvan or broker, and a plea was put in on the ground that the plaintiff was an alien born and an infidel, not of the Christian faith, and upon a cross bill incapable of being examined upon oath, and therefore disqualified from suing here; the Court overruled the plea without argument, observing that the plaintiff's was a mere personal demand, and that it was extremely clear that he might bring a bill in this Court. It has been stated, however, the Court will not protect the copyright of a foreigner (b) (3); this must, however, be considered as applying only to books published by a foreigner abroad, for there seems to be no reason why a foreigner publishing a book in this country should not be entitled to the same protection which the law affords to native authors. right of an alien to sue in the Courts of this country was at Common Law confined to cases arising upon personal demands; for an alien might trade and traffic, and buy and sell, and therefore

whether they can sue for copyright;

⁽a) 1 Atk. 51; see also the case of See stat. 7 & 8 Vic. c. 12, intituled Pisani v. Lawson, 6 Bing. N. C. 90.

(b) Delondre v. Shaw, 2 Sim. 237; to International Copyright."

⁽¹⁾ The disabilities by outlawry and excommunication are either wholly unknown in America, or, if known at all, are of very limited local existence. Story Eq. Pl. § 51.

Story Eq. Pl. § 51.

(2) Story Eq. Pl. § 51, 52.

An alien does not lose his right to sue in the Courts of the United States by residing in one of the States of the Union. Breedlove v. Nicolet, 7 Peters,

⁽³⁾ See 2 Kent, (5th ed.) 373, note (b).

he was considered to be of ability to have personal actions, but he Not Enemies. could not maintain either real or mixed actions (c), because an alien, though in amity, is incapable of holding real property (d) (1).

By a recent statute, intituled "An Act to amend the Laws re-7&8 Vict. lating to Aliens," it is enacted, "that every person now born or c. 66. hereafter to be born out of her Majesty's dominions, of a mother, being a natural-born subject of the United Kingdom, shall be capable of taking to him, his heirs, executors, or administrators, any estate, real or personal, by devise or purchase, or inheritance of succession."

And by sect. 4, of the same Act, it is enacted, "that from and after the passing of this Act, every alien being the subject of a friendly state, shall and may take and hold by purchase, gift, bequest, representation or otherwise, every species of personal property except chattels real, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural born subject of the United Kingdom."

And by sect. 5, of the same Act, it is enacted, "that every alien now residing in, or who shall hereafter come to reside in any part of the United Kingdom, and being the subject of a friendly state, may by grant, lease, demise, assignment, bequest, representation or otherwise, take and hold any lands, houses, or

(c) Co. Lit. 129 b.

(d) Ibid. 2 b.

An alien friend cannot maintain ejectment; but if he is in possession of real property, he may maintain trespass, quare clausum fregit. Bayes v. Hogg, 1 Hayw. 485.

Lunn, 3 ib. 109; Orser v. Hoag, 3 Hill, 79.

An alien, who holds land under a special law of a State, may maintain a suit in the Circuit Court of the United States, relating to such land. Bonsparte v. Camden, &c. Rail Road Co., 1 Baldwin, 216.

⁽¹⁾ The title of an alien friend to land purchased or devised to him, is good against every body but the State, and can only be divested by office found or against every body but the State, and can only be divested by office found or by some act done by the State to acquire possession. 2 Kent, (5th ed.) 54, and note; M'Creery v. Allender, 4 Har. & M'Hen. 409: Groves v. Gordon, 1 Conn. Rep. 111; Marshall v. Conrad, 5 Call, 364; University v. Miller, 3 Dev. 191; Doe v. Hornibles, 2 Hayw. 37; Buchanan v. Deshon, 1 Har. & Gill, 280; Scanlan v. Wright, 13 Pick. 523; Jenkins v. Noel, 3 Stew. 60; Doe v. Robertson, 11 Wheaton, 332; Dudley v. Grayson, 6 Monroe, 260; Jackson v. Adams, 7 Wendell, 367; Bradstreet v. Supervisors, &c. 13 Wendell, 546; 1 Jarman, Wills, (1 Am. ed.) 59, note (1); Wilbur v. Tobey, 16 Pick. 179; Foss v. Crisp, 20 Pick. 124; People v. Conkin, 2 Hill, 67. An alien friend cannot maintain ejectment: but if he is in possession of

But an alien's right to sustain an action for the recovery of land in case of an intrusion by an individual was maintained in M'Creery v. Allender, 4 Har. & M'Hen. 409; Bradstreet v. Supervisors, &c. 13 Wendell, 546. See also Scanlan v. Wright, 13 Pick. 523; Jackson v. Britton, 4 Wendell, 507; Jackson Ex Dem. Culverhouse v. Beach, 1 John. Cas. 399; Gansevoort v.

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other tenements, for the purpose of residence or of occupation, by him or her, or his or her servants, or for the purpose of any business, trade or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions and privileges, except the right to vote at elections for members of Parliament, as if he were a natural-born subject of the United Kingdom."

In suits between aliens upon contracts in a foreign country;

the decision is governed by the law of that country.

Although an alien may maintain a suit in this country, yet if one alien sues another upon a contract entered into in a foreign country, it would be contrary to all the principles which guide the Courts of one country in deciding upon contracts made in another, to give a greater effect to the contract than it would have by the laws of the country where it took place (1): therefore, where a French emigrant resident in this country obtained by duress securities from another French emigrant for the payment of a demand, alleged to be due from him, under an obligation entered into in France as security for another, and for which, according to the laws of France, his person could not be affected, Lord Loughborough refused to dissolve an injunction which had been obtained to restrain an action at Law upon those securities, and intimated a very strong opinion, that when the case came on for hearing he should in all probability set the securities aside (e) (2). Upon

Ne exect Regno.

(e) Talleyrand v. Boulanger, 3 Ves. 447.

(1) Suits are maintainable and are constantly maintained between foreign-

ers, where either of them is within the territory of the State, in which the suit is brought, both in England and America. Story Conf. Laws, § 542.

In Brinley v. Avery, Kirby, 25, it was held that a plea in abatement, that both parties are aliens, and that the contract declared on was made in a foreign country, and was to have been performed there, is good.

In Dumoussay v. Delevit, 3 Har. & John. 151, an action of replevin was

held abatable on a plea that both parties were aliens, and the Court therefore had not jurisdiction.

In Burrell v. Benjamin, 15 Mass. 354, the Court were inclined to the opinion that one foreigner may sue another, who is transiently within the jurisdiction of the Courts of a State, upon a contract made between them in a foreign country.

In construing such contracts the law of the place where they are made will be administered. Ib. p. 357; Story Conf. Laws, § 270, et seq.; De La Vega v. Vianna, 1 Barn. & Adol. 284. But the remedy will be applied according to the law of the place where it is pursued. Post, 55 note. A controversy between two foreigners, who are private citizens, is not cognisable in the Courts of the United States under the Constitution, see Burrell v. Benjamin, 15 Mass. 357.

(2) In reference to contracts made with persons under duress, see Chitty, Contracts, (6th Am. ed.) 207, and notes; Richardson v. Duncan, 3 N. Hamp. 508; 1 Story Eq. Jur. § 239, and cases cited; Cruise v. Christopher, 5 Dana, 182; Morrison v. McLeod, 2 Dev. & Bat. 221; Gregg v. Hartlee, C. W. Dud. Eq. 42; Wilkinson v. Stafford, 1 Sumner's Vesey, 43, note (5). the same principle it was held by Lord Hardwicke, that the Court Not Enemies. will not grant a writ of Ne exeat Regno, where it appears that the transactions between the parties were entered into upon the faith of having justice in the place where they respectively resided (f), though in the case before him he considered that the parties did not deal upon any such understanding, and therefore refused to discharge the writ without security.

But although in the case of foreigners resident abroad entering into engagements in a foreign country, which, by the law of that country, do not admit of arrest, the law of England will not allow one party to arrest another, either in an action at Common Law (1), or in a suit of Equity, for a Ne exect Regno; yet if one of the parties is an Englishman, and they were both resident in different countries at the time the contract was entered into, the Court will not discharge a Ne exeat obtained by the party resident in this country, against the other who had casually come hither, on the ground that, by the law of the country of which the other was a native, he would be exempt from arrest for a debt of the same nature (g). It is, however, to be observed, that with respect Not usally to writs of Ne exeat Regno, Lord Northington is distinctly stated granted between foto have thought, that this process ought not to be granted between reigners. foreigners (h); and in De Carriere v. De Calonne (i), Lord Thurlow said it is very delicate to interfere as against foreigners, Except when whose occasions or misfortunes have brought them here, by an clear. application of this writ to them, and that it would be a necessary

(f) Robertson v. Wilkie, Amb. 177; and see De Carriere v. De Ca-(g) Flack v. Holm, 1 Jac. & W. (k) 4 Ves. 585. (i) 4 Ves. 590. lonne, 4 Ves. 590.

⁽¹⁾ In De La Vega v. Vianna, 1 Barn. & Adol. 284, it was held that one foreigner may arrest another in England for a debt, which accrued in Portugal while both resided there, though the Portuguese law does not allow of arrest for debt. In the above case Lord Tenterden, C. J. remarked, that a person suing in England must take the law as he finds it; he cannot by virtue of any regulation in his own country, enjoy greater advantages than other suitors in England, and he ought not therefore to be deprived of any superior advantage which the law of this country may confer. He is to have the same rights which all British subjects are entitled to. The remedy upon same rights which all British subjects are entitled to. The remedy upon contracts is governed by the law of the place where the parties pursue it. See also Whittemore v. Adams, 2 Cowen, 626; Willing v. Consequa, 1 Peters, C. C. 317; Contois v. Carpentier, 1 Wash. C. C. 376; Wyman v. Southward, 10 Wheat. 1; Don v. Lippman, 5 Clark & Fin. 1; Hinkley v. Moreau, 3 Mason, 88; Titus v. Hobart, 5 Mason, 378; Atwater v. Townsend, 4 Conn. 47; Story Conf. Laws, § 568-571.

The same doctrine was maintained in Smith v. Spinolla, 2 John. 198. See also Peck v. Hozier, 14 John. 346; Sicard v. Whale, 11 John. 194; Talleyrand v. Boulanger, 3 Sumner's Vesey, 447, note (a).

Not Enemies. term that it shall be simply a case of Equity, affording no ground to sue at Law (1).

Cannot sue either for real or personal property, unless resident here by Queen's license.

or under the proclamation of war.

Prisoners of

With respect to alien enemies, the law is clearly settled by numerous cases, that an alien enemy not resident here, or resident here without the permission of the government, cannot institute any suit whatever in this country, whether at Law or in Equity, either for real or personal property, until both nations be at peace (k); and it is said that the question, whether he is in amity or not, shall be tried by the record, viz. by the production of the proclamation of war (1) (2). It is to be observed, that in declaring war, the Queen in her proclamation usually qualifies it by permitting the subjects of the enemy resident here to continue so long as they peaceably demean themselves, so that without doubt such persons are to be deemed in effect alien friends (m); therefore, where an alien enemy has lived here peaceably a long time. or has come here for refuge and protection, the Court will discountenance pleas of alienage against them (n). It seems also that a prisoner of war may sue upon a contract entered into by him during the time of his captivity; thus where the subject of a neutral state was taken in an act of liability to this country, on board an enemy's fleet, and brought to England as a prisoner of war, it was held that he was not disqualified while in confinement from maintaining a suit entered into by him as a prisoner of war (o) (3).

The mere circumstance of residing in a foreign country, the government of which is at war with this country, and of carrying on trade there, is sufficient to constitute any person an alien enemy, even though he would not otherwise be considered in that character (4). Thus a subject of a neutral state, resident in a

(k) Co. Litt. 129 b.; 6 T. R. 23; 1 Bos. & P. 163; 3 Bos. & P. 113. (l) Harg. & Butler's Co. Litt. 129

(m) Ibid. n. 3. (n) Wyatt's Prac. Reg. 327. (o) Sparenburgh v. Bannatine, 1 Bos. & P. 163.

As to the object, uses and mode of obtaining this writ of ne Exeat, see Etches v. Lance, 7 Vesey, (Sumner's ed.) 417, note; Roddam v. Hetherington, 5 ib. 91, note (a), and cases cited; De Carriere v. De Calonne, 4 Sum-

⁽¹⁾ A writ of me Exect may issue against a foreigner or citizen of another State, and on demands arising abroad. Mitchell v. Bunch, 2 Paige, 606; Gibert v. Colt, 1 Hopk. 500. But the writ will be discharged upon the defendants giving security to abide the decree. Woodward v. Schutzell, 3 John. Ch. 412; Atkinson v. Leonard, 3 Bro. C. C. (Perkins's ed.) 218, 224, and notes; Roddam v. Hetherington, 5 Summer's Vesey, 91.

ton, 5 ib. 51, note (a), and cases cited, 56 Carlonne, 4 Samer's Vessy, 577, note (a); 1 Smith Ch. Pr. (2d Am. ed.) 577, note (a).

(2) Ante, 34, note; Crawford v. The William Penn, 3 Wash. C. C. 484.

(4) 1 Kent, (5th ed.) 73, et seq.; Case of the Sloop Chester, 2 Dallas, 41;

stitutes Alien

hostile state in the character of consul of the neutral state, will, if What conhe carry on trade in the hostile country, be considered as an alien enemy, and disqualified from suing in the Courts of this country, enemy, and disqualified from suing in the Courts of this country, Residence or although, had he merely resided there in his diplomatic character, trading in an he would not have been disqualified (p); and even if a British enemy's counsubject residing in a foreign state which is at war with this coun-try; try, carry on trade there without a license from the government although a neutral; of this country, his trading will be considered such an adherence or a consul, if to the Queen's enemies as will incapacitate him from maintaining he carry on a suit here (q); and although he be an ambassador or other representative of the Crown residing in a hostile state, yet if he carry subject, on trade in such state without a license, he will deprive himself if trading of the right to sue in the Municipal Courts of this country, be- without a licause he is lending himself to the purposes of the enemy by fur-though resinishing him with resources (r).

shing him with resources (r).

If, however, a subject of this country, residing in a hostile pacity. country, have a license from this government to trade, he will not British subincur any disability as long as he confines himself to the trade au- jects trading incur any disability as long as ne connnes ministry to the trade authorized by such license (s) (1); but if a person having a license must confine to reside in an hostile country, and to export corn or other speci-their trade to fied articles to this country, were to use such license beyond its that authorized by the license. expression, for the purpose of dealing in articles to which it has no relation, he cannot maintain that such dealing is not an enemy's dealing (t).

The disability to maintain a suit on account of alienage extends In what cases to all cases in which an alien enemy is interested, although his suits can be name does not appear in the transaction (2); thus, it has been others, relaheld that an action at Law cannot be maintained upon a policy of ting to the insurance upon the property of an alien enemy, even though the emies. action is brought in the name of an English agent (u), and though it is alleged that the alien is indebted to the agent in more money

maintained by

⁽p) Albretcht v. Sussman, 2 Ves. & B. 323.

⁽q) M'Connell v. Hector, 3 Bos. & P. 113.

⁽r) Ex parte Baglehole, 18 Ves. 529; [Sumner's ed. 525, note (a)].
(s) Ibid.
(t) Ibid.

⁽u) Bristow v. Towers, 6 T. R. 35.

Murray v. Schooner Betsey, 2 Cranch, 64; Maley v. Shattuck, 3 Cranch, 488; Livingston v. Maryland Ins. Co. 7 Cranch, 506; The Venus, 8 Cranch, 253; The Francis, 8 Cranch, 363; Chitty, Cont. (6th Am. ed.) 182; Society

v. Wheeler, 2 Gallison, 105.
(1) See Crawford v. The William Penn, 3 Wash. C. C. 484.

⁽²⁾ Crawford v. The William Penn, 1 Peters, C. C. 106. It is no objection after the war, that the suit was brought by the plaintiff as trustee for an alien enemy. Hamersly v. Lambert, 2 John. Ch. 508.

Alien Enemies.

than the value covered by the policy (x). Where, however, a certain trading of an alien enemy (viz., for specie and goods to be brought from the enemy's country in his ships, into our colonial ports) was licensed by the King's authority, it was held that an insurance on the enemy's ship, as well as on the cargo, was in furtherance of the same policy, which allowed the granting of the licenses to authorize the trade; and that effect ought, therefore, to be given to the ordinary means of indemnity, by which that trade (from the continuance of which the public must be supposed to derive benefit) may be best promoted and secured; the Court of King's Bench therefore determined that an action brought by an English agent to recover the amount of the insurance on the ship, might be maintained notwithstanding the ship belonged to an enemy. It was held, however, that although in such a case the agent might sue, because the King's license had purged the trust in respect to him of all its injurious consequences to the public interest, yet that it had not the same effect of removing the personal disability of the principal, so as to enable him to sue in his own name (y).

Alien enemies cannot file bills of discovery.

The disability to sue under which an alien enemy lies is personal, and takes away from the Queen's enemies the benefit of her Courts, whether for the purpose of immediate relief or of giving assistance in obtaining that relief elsewhere; therefore an alien enemy cannot institute a suit for the purposes of obtaining a discovery, even though he seek no further relief (z) (1).

Right of an sue, merely suspended during war; entered into before; but not as to contracts entered into during war.

It is to be observed, that the right of an alien to maintain a suit alien enemy to relating to a contract, is only suspended by war, if the contract was entered into previously to the commencement of the war, and that it may be enforced upon the restoration of peace (2). Upon this as to contracts principle, in bankruptcy, the proof of a debt due to an alien enemy upon a contract made before the war broke out, was admitted, reserving the dividend (a). But no suit can be sustained to en-

(z) Daubigny v. Davallon, 2 Anst. 462. (z) Brandon v. Nesbitt, ibid. 23; Chitty Cont. (6th Am. ed.) 182, note (a) Ex parte Boussmaker, 13 Ves. (2).] (y) Kensington v. Inglis, 8 East, 71; [Sumner's ed. 71, note (a), and 273; [1 Phil. Ins. (2d ed.) 55-58.] cases cited.]

⁽¹⁾ Story Eq. Pl. § 53, and note; Albretcht v. Sussman, 2 Ves. & Bea. 323-326.

An alien friend, it is well known, may maintain a bill for discovery in aid

of a suit in a foreign country. 2 Story Eq. Jur. § 1495; Mitchell v. Smith, 1 Paige, 287; Story Eq. Pl. § 53, in note.

(2) Ante, 34, note; Chitty Cont. (6th Am. ed.) 182; Flindt v. Waters, 15 East, 260; Hamilton v. Eaton, U. S. Circuit Ct. 2 Mar. 1; The Ship Francis, 1 Gallison, 448; Buchanan v. Curry, 19 John. 138; Bell v. Chapman, 10 John. 183.

force an obligation arising upon a contract entered into with an alien enemy during war, such contract being absolutely void (b). And where a policy of insurance on behalf of French subjects was entered into just before the commencement of the war, upon which a loss was sustained in consequence of capture by a British ship after hostilities had commenced, the proof of a debt arising from such policy, which had been admitted by the commissioner in bankruptcy, was ordered to be expunged (c).

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The principle upon which the last-mentioned case was decided, is fully stated by Lord Ellenborough in Brandon v. Curling (d). where it is laid down by his Lordship as a rule, that every insurance on alien property by a British subject must be understood with this implied exception, "that it shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured or assurer."

A defence on the ground that the plaintiff is an alien enemy When objecshould be made by plea before answer. Thus, where a bill was tion may be tafiled by a plaintiff residing in a foreign country at war with this, for a commission to examine witnesses there, and the defendant put in an answer, an application for an order for the commission was granted, though it was objected that the Court ought not to grant a commission to an enemy's country, the Court being, as it seems, of opinion that the objection had come too late (e).

It does not appear from any case in the books, what would be Effect of a the effect of a war breaking out between the country of the plain-war upon a tiff and this country, after the commencement of the suit, but from commenced. analogy to what is stated by Lord Chief Baron Gilbert to be the practice of the Court with regard to outlawry, namely, that if it is not pleaded it may be shown to the Court on the hearing, as a peremptory matter against the plaintiff's demands, because it shows the right to the thing to be in the Queen (f), it is probable that the Court would, under such circumstances, stay the proceedings (1).

⁽b) Ibid. (c) Ex parte Lee, 13 Ves. 64 : [Sum-

ner's ed. note (a).]
(d) 4 East, 410; [1 Phil. Ins. (2d) ed.) 55-58.]

⁽e) Cahill v. Shepherd, 12 Ves. 335. (f) Gill. For. Rom. 53.

⁽¹⁾ If the plaintiff becomes an alien enemy after the commencement of the suit, the defendant may plead it. Bell v. Chapman, 10 John. 183. See Society v. Wheeler, 2 Gallison, 105.

But where the plaintiff becomes an alien enemy after judgment, the Court will not, on motion, stay, or set aside the execution. Buckley v. Lyttle, 10 John. 117. See Owens v. Hanney, 9 Cranch, 180.

Alien Enemies Plea of alien enemy.

It appears to be the essence of a plea that the plaintiff is an alien enemy, to state that the plaintiff was born out of the liegance of the Queen, and within the liegance of a state at war with us; but where the plea contains words which amount in substance to an allegation of these facts, it will be sufficient, although they are not averred with the same strictness that is required by the rules Thus, where a plea averred that the plaintiffs were Frenchmen, aliens and enemies of the King, the Court held that the plea was sufficient, the word alien being a legal term, importing born out of the liegance of the King, and within the liegance of some other state; and the words, Frenchman and enemies to the King, showing that they were the subjects of a state at war with this country (g).

War with this country judicially noticed; Secus, a war between foreign countries. Security for costs.

It is to be observed, that the Courts here take notice, without proof, of a war in which this country is engaged (1), but a war between foreign countries must be proved (h).

In all cases of a person permitted to sue in equity, if he state himself in his bill to be resident abroad, or if it come to the knowledge of the defendant that he is actually so, the defendant may obtain an order of the Court that the plaintiff shall, before he proceeds further, give security to answer to the defendant the costs of the suit (i). The practice with respect to this rule has been before stated (k) (2), and is applicable to aliens and foreigners, as well as to natural-born subjects.

## SECTION III.

## Persons outlawed in Civil Actions (3).

In what cases outlawry disqualifies.

Besides the disabilities arising from alienage, there are others which may prevent a person from maintaining a suit in the Courts

- (g) Daubigny v. Davallon, 2 Anst. 462.
- (k) Dolder v. Lord Huntingford, 11
  - (i) Meliorucchy v. Meliorucchy, 2
- Ves. 24; Green v. Charnock, 1 Ves. J. 396; Hoby v. Hitchcock, 5 Ves. 699; Seilaz v. Hanson, 5 Ves. 261; Drever v. Maudesley, 5 Russ. 11.
  - (k) See page 37.
- (1) See Baby v. Dubois, 1 Blackf. 255, cited ante, 34, note; Johnson v. Harrison, 6 Litt. 226.
- (2) Ante, 34-40, and notes.
  (3) The process of outlawry is generally unknown in this country. Story Eq. Pl. § 51, 723.
  In the State of New York it is provided by Statute, "that no outlawry in any personal action, shall work any disability or forfeiture whatsoever in

of this country as long as such disabilities last. The first of these which shall be noticed is outlawry in a civil suit. "An outlaw," says Littleton, "is out of the law to sue an action during the time, that he is outlawed" (1); and all persons may take advantage of the disability (m). The maxim "frustra legis auxilium implorat qui in legem committit," comprises both the reason and the justice on which this disability stands. "Justum est enim judicium," says Bracton, " quod sine lege et judicio pereat qui secundum legem vivere recusat (n).

Outlawry.

It seems, however, that an outlawry in an action at Law will Must be in annot disqualify the party outlawed from suing in Equity for relief other suit. from his liability at Law in such action (o); thus if a bill be for relief against an action at Law, and outlawry be pleaded by the defendant in the same cause, it is a bad plea, because the outlawry is part of the grievance, and it is exceptio ejusdem rei cujus petitur dissolutio (p).

Outlawry in an executor or in a prochein amy is no disqualifica- Will not distion, because they do not claim in their own right, the real plain-suing in sutre tiff being the testator or infant; and the outlawry of any third droit; person is no exception against him why he should not be admitted to sue (q); and so where a husband and wife sue as administrators, outlawry in the husband is no disqualification. stated, however, that outlawry in the plaintiff's testator, where the in a testator is a good plea in action is brought by an executor, is a good plea at Law (r), suits by execualthough an executor or administrator cannot plead such outlawry tors. in his testator (s). The outlawry of a mayor is not a good plea In heads of to an action at Law by the mayor and commonalty; and it seems corporations. that such a plea would not prevail in Equity (t). From what was before stated, it would appear doubtful whether an outlaw can be a relator (u).

It is But outlawry

It is stated that outlawry in the Courts of the county palatine

- (l) Co. Litt. 128 a.
- (m) Ibid.
- (n) Beames on Pleas, 100.
  (c) Ord. in Chan. (Ed. Beames)
  175, n. 40.
- (p) Jenk.Cent. 37; Gilb. For. Rom. 54.
  - (q) Gilb. For. Rom. 54. Arnold v.

Arnold, Toth. 76; Killigrew v. Killigrew, 1 Vern. 184; Swan v. Porter, Hardr. 60.

- (r) Lut. 1604.(s) Beames on Pleas, 103 n.; Com.
- Dig. Abatement, E. 2.
  (t) Beames on Pleas, 104.
  - (u) See page 17.

favor of any other person than the plaintiss at whose suit it shall be had." 1 N. R. L. 165. See Chitty, Cont. (6th Am. ed.) 184, note (1); Roosevelt v. Crommelin, 18 John. 253; Dillman v. Schultz, 5 Serg. & R. 36.

Outlawry.

Outlawry ought to be pleaded;

But may be shown at the hearing.

Also after attachment.

Plea of outlawry.

and duchy of Lancaster may be pleaded in disability of a plaintiff suing in a superior Court at Westminster (v).

The proper way in which to take advantage of the outlawry of a plaintiff, appears to be by plea ante litem contestatam, that is, before answer, for after answer the defendant admits the plaintiff to to be a proper person to be answered to; and therefore such plea would then come too late; but it is said that if an outlawry be not pleaded, yet it may be shown at the hearing as a peremptory matter against the the plaintiff's demands, if it be personal, because it shows the right to the thing in demand to be in the Queen (z).

It has been determined, that a defendant against whom an attachment has been issued for want of an answer, may file a plea of outlawry (y).

In a plea of outlawry, the record of outlawry or the capias thereupon must be pleaded sub pede sigilli, and is usually annexed to the plea (z); and the defendant may show as many outlawries as he can (a).

In Dalton v. Beavan (b), the defendant pleaded that the plaintiff was an outlaw, and annexed to his plea a copy of the record of the proceedings in the outlawry, and it was contended on behalf of the plaintiff that the proceedings as set out in the plea were irregular, and in violation of the late Act of Parliament called the Uniformity of Process Act; and that as the defect appeared on the plea itself, the Court was bound to take notice of it, and to treat the outlawry as of no force, but Sir C. Pepys, M. R., said that the Uniformity of Process Act was merely directory, and did not go to declare that any defect or omission in this respect should render the proceedings void. At all events his Honor was of opinion that as the outlawry pleaded was the judgment of a competent tribunal, so long as it remained on the records of that tribunal unreversed, the Court was bound to presume that it was regular and valid.

By an old order of the Court, if the plea of outlawry is resorted to " in any suit for that duty touching which relief is sought by the bill, it is insufficient, according to the rule of law, and shall be disallowed of course, as put in for delay, and the plaintiff may, nothwithstanding such plea, take out process to enforce the de-

⁽z) Gilb. For. Rom. 53; and see Philipps v. Gibbons, 1 Ves. & B. 184. (y) Waters v. Chambers, 1 S. & S. 225. (v) Beames on Pleas, 104, 105.

⁽z) Tothill, 54.

⁽a) Curs. Can. 185. (b) Rolls, March 5, 1835.

fendant to make a better answer, and pay five marks costs, otherwise a plea of outlawry is always a good plea, so long as the outlawry remaineth in force, and therefore the defendant shall not be put to set it down with the registrar (c)."

Outlawry.

It is to be observed, that by the short note of a case which occurs in Vern. (d), it is stated that a plea of outlawry was overruled because it was not put in upon oath. It does not appear from the report, upon what ground this point was determined; but it is presumed that it must have been on the ground that such oath was necessary to support the averment in the plea that the plaintiff was the same person, because it is quite clear that in pleas of matters of record the seal of the Court is sufficient testimony of the truth. In a subsequent case in the same volume (e), No oath requirit appears that a reference was made to the six clerks, whether by outlawry. the course of the Court a plea of outlawry, with averment of the same person, ought to be upon oath; and it was stated that in Lord North's time it was ruled that it might be without oath, because it might come in on the other side to aver that he was not the same person. Whereupon the Court, as it was only the common averment of identity of person, allowed the plea to be good without oath (f); and this seems to be in accordance with Lord Bacon's order (g).

With respect to proceeding after an outlawry has been reversed, Of proceeding Lord Clarendon's order says, that after outlawry reversed, the de- in the suit after reversal of fendant on a new subpæna served on him, and payment unto him the outlawry. of 20s. costs, shall answer the same bill as if such outlawry had not been (h). From this it appears that under such circumstances the suit may be proceeded in by serving a new subpæna, without filing a bill of revivor; but Lord Chief Baron Gilbert says, that in such a case a bill of revivor must be filed, because the suit being abated, the plaintiff has no day in Court; and it is apprehended that such must be the course of proceeding, because the plea of outlawry is part of the record; and the judgment upon it, which is also on the record, shows that the Court considered the matter alleged in the plea a good reason why the defendant should not be called upon to answer the plaintiff's bill. If the suit is to be proceeded with after such a judgment, there must be some entry on the record to show that the ground upon which the Court gave its judgment has been removed, otherwise the subsequent pro-

⁽c) Ord. in Chan. (Ed. Beames) 175.

⁽d) Parrot v. Bowden, 2 Vern. 37.

⁽e) Took v. Took, 2 Vern. 198.

⁽f) Vide acc. Pratt v. Taylor, 1 Ch. Ca. 237; Freem. 143, S. C.

⁽g) Ord. in Ch. (Ed. Beames) 26, and see Gilb. For. Rom. 93. (h) Ord. (Ed. Beames) 175.

Outlawry.

ceedings would be erroneous; and there seems no other form in which this can be shown than by bill of revivor, as suggested by Lord Chief Baron Gilbert.

#### SECTION IV.

## Persons attainted or convicted.

Cannot sue.

After judgment in a prosecution for treason or felony, the criminal is said to be attainted, attinctus, or blackened (i), and becomes incapable of maintaining a suit in any Court of justice, either civil or criminal, unless for the purpose of procuring a reversal of his attainder (k) (1). It is also to be observed, that the consequences of attainder are, forfeiture of all the party's property, real and personal, and disqualification from holding any which he may in future acquire either by descent, purchase or contract (l). So that even if he had the power of suing it would be useless, as he has no power of retaining what he sues for, even should he succeed, the right to the property in such cases being in the Crown.

What things are forfeited; in treason; With respect to the forfeiture of real estates by attainder, there is a distinction between attainders for treason and for felony. By attainder for treason a man forfeits to the Queen all his lands and tenements of inheritance, whether fee simple or fee tail, and all his rights of entry in lands or tenements which he had at the time of the offence committed, or at any time afterwards, to be for ever vested in the Crown, and also the profits of all lands and tenements which he had in his own right, for life or years, so long as such interest shall subsist (m); but with respect to attainder for felony, the 54 Geo. III. c. 145, enacts, that except in cases of high treason, petit treason, and murder or abetting the same, no

in felony.

(i) 4 Bl. Com. 381. (k) Ex parte Bullock, 14 Ves. 452. (l) Bullock v. Dodds, 2 Barn. & Ald. 277. (m) 4 Bl. Com. 381.

⁽¹⁾ A person attainted under the act of New York, 1799, is considered as civiliter mortuus. Jackson v. Catlin, 2 John. 248.

One attainted under the act cannot sustain an action for rent due to him previous to the passing of the act, or make it a set-off in an action by his lessee. Sleght v. Kade, 2 John. 236.

A plea of attainder is of rare occurrence, and a plea of this sort in Equity would probably be construed with the same strictness, as the like plea is at law. Story Eq. Pl. § 723.

attainder shall extend to the disinheriting any heir, nor to the prejudice of the right or title of any person except the offender during his life only; and upon the death of the offender every person to whom the right or interest of any land or tenements, should or might after the death of such offender have appertained, if no such attainder had been, may enter thereupon (n).

Effects of Attainder.

The forfeiture of real estate consequent upon attainder of trea- From what son or felony, relates backwards to the time of the treason or felotime forfeiture takes place. ny committed, so as to avoid all intermediate sales or incumbrances, but not those before the fact (o). The case is, however, Of real estates. different with regard to the forfeiture of goods and chattels, for Of chattels. that has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited (t). But by attainder, not only all the personal property and rights of action which a man actually has are forfeited; but all personal property and rights of action, which accrue to the offender after attainder, are forfeited and vested in the Crown without office found; so that it has been held that attainder may be well pleaded in bar to an action on a bill of exchange endorsed to the plaintiff after his attainder (u). There is another distinction between the forfeiture What things of real and of personal estate — lands are forfeited upon attainder, are forfeited upon attainder, upon attainder. and not before; goods and chattels are forfeited upon conviction, because in many of the cases where goods are forfeited there nev- Upon convicer is any attainder, which happens only where judgment of death tion. or outlawry is given; and being necessarily upon conviction in those, it is so ordered in all other cases (x). In outlawries for treason or felony, lands are forfeited only by judgment, but goods Of forfeiture and chattels are forfeited by a man's being put in the exigent, with-in outlawries for criminal out staying till he is quinto exactus or finally outlawed, for the offences. secreting himself so long from justice is construed into a flight in law (y).

These points, although they do not immediately relate to the Attainder and personal disqualification from suing under which a party lies who conviction. has been attainted either of treason or felony, are nevertheless necessary to be adverted to, because if a party claiming a title to property under an attainted person were to institute proceedings in

(n) All copyhold estates are for-feited to the lord and not to the (o) 4 Bl. Com. 381. Queen, unless there be an Act of Parliament or an express custom to the contrary (1 Cruise's Dig. 361); and the forfeiture in such case does not accrue upon mere conviction, but only on complete attainder, (3 B. & Ald. 510, 2 Vent. 38,) unless by spe-

(o) 4 Bl. Com. 381. (t) 4 Bl. Com. 387.

(u) Bullock v. Dodds, 2 B. & Ald. 258.

(z) 4 Bl. Com. 387; and Perkins v. Bradley, 1 Hare, 219. (y) Ibid.

Effects of Attainder.

a Court of justice relating to that property, his claim might be met by pleading the attainder of the person from whom his claim was derived (z); and in such case the time when the forfeiture accrued may be a very important point for consideration.

How taken advantage of.

Attainder and conviction, like outlawry, must be taken advantage of by plea. Lord Redesdale says, that such a plea is very rare, and that it would be judged with the same strictness as if it were a plea at Law (a). In Burt v. Brown (b) an instance of a plea of conviction for manslaughter appears to have occurred, and the plea was overruled on the ground that the part of the body on which the wound was inflicted was not sufficiently described, and because it was averred that the offender was tried at the Galloway assizes, without saying that the persons who tried him had a commission of gool delivery, or were justices of over and terminer.

It may be observed here, that in order to bar a plaintiff's suit, it is not always necessary to show an attainder or conviction; for if a plea goes to show that in consequence of an offence committed no title ever vested in the plaintiff, conviction of the offence is not essential to the plea. Thus, in the Exchequer, to a bill seeking the discovery of the owners of a ship captured and payment of ransom, the defendant pleaded that the owner was a natural-born subject, and the capture an act of piracy; and though the Barons at first thought that the plea could not be supported unless the plaintiff had been convicted of piracy, and the record of the conviction had been annexed to the plea, they were finally of opinion that as the plea showed the capture was not legal, and that therefore no title had ever been in the plaintiff, the plea was good (c).

Plea, that the act under which plaintiff derives title, was criminal.

Effect of reversal of attainder, &c.

Where a judgment pronounced upon a conviction for treason or felony is falsified or reversed, all former proceedings are absolutely set aside, and the party stands as if he had never been accused, and is restored to his credit, his capacity and blood, and his estates: with regard to which last, it is said, that though they be granted away by the Crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor (d). From this it follows of course that he may, if he is entitled to equitable relief, sue for it in a Court of Equity, in the same manner that he might have done if no attainder had taken place.

⁽²⁾ Lord Red. 189.

⁽a) Ibid. 186.

⁽b) 2 Atk. 399.

⁽c) Fall v. —, May 1782, Lord Red. 190.

⁽d) 4 Bl. Com. 393.

The only way in which the disqualification arising from an attainder or conviction may be obviated, is by the Queen's pardon. This formerly could only have been granted under the Great Seal; Effect of a parbut now, by 6 Geo. IV. c. 25, s. 1, a warrant under the Royal don. sign manual, countersigned by one of the Principal Secretaries of State, granting a free pardon, and the prisoner's discharge under it; or granting a conditional pardon, and the performance of such condition, is as effectual as a pardon under the Great Seal.

Effects of Attainder.

There is a great difference between the effect of a pardon and Difference beof a reversal. In the case of the reversal of an attainder, the tween pardon and reversal. party is, as we have seen, in all respects replaced in the same condition that he was in before the commencement of the proceedings, and he is restored to his former credit and capacity; but the effect of a pardon is not so much to restore his former, as to give him a new credit and capacity (e). Thus a person, who has been convicted and pardoned, cannot sue upon any right accrued to him before his pardon, although he may for a right accrued afterwards (f).

With respect to pardons it is to be observed, that where they Effect of conare conditional the effect of the attainder is not removed till the ditional parcondition has been performed; therefore, where a man who had been attainted of felony, but pardoned under the 8 Geo. III. c. 15, on condition of his being transported to New South Wales, re-Transportaturned to England before the expiration of the period for which he tion. was transported, and commenced an action here for a demand accrued since his return, to which the defendant pleaded the conviction and judgment in bar; it was held by the Court of Queen's Bench, that the mere fact of transportation did not amount to an actual pardon, under the statute 8 Geo. III. c. 15, and that it was necessary not only that the offender should be transported, but that he should remain in the place to which he was sent during the time for which he was ordered to be transported, before he could be restored to his civil rights (g). Upon the authority of the above case, Sir. J. Leach, M. R., held that personal property which did not belong to a felon at the time of his conviction, but which accrued to him afterwards during the time of his transportation, was forfeited to the Crown (h).

It is to be observed, that in the case of Bulluck v. Dodds Remission of above referred to, the plaintiff had returned on the faith of an in-transportation. strument under the seal of the territory of New South Wales, by

⁽e) 4 Bl. Com. 402. **258.** (g) Bullock v. Dodds, 2 B. & Ald. M. 752.

tainder.

Effects of At- which the governor had remitted the remainder of the plaintiff's sentence, under the authority of the 30 Geo. III. c. 47, (by which his Majesty was empowered to authorize the governor or lieutenantgovernor of any place to which convicts are transported, to remit either absolutely or conditionally the whole or any part of their term of transportation, which remission was to be of the same effect as if his Majesty had signified his intention of mercy under the sign manual, &c.): but the Court was of opinion, that the effect of the remission of sentence by the governor merely placed the party in the situation in which he would have been, in case he had received a warrant for a pardon under the privy seal or sign manual, which before the 6 Geo. IV. c. 25, s. l, could not be pleaded as a pardon (i). In consequence of this decision it has been enacted by the 5 Geo. IV. c. 84, s. 26, that a felon under sentence or order of transportation, receiving a remission of the sentence from the governor or lieutenant-governor of New South Wales, or any other colony, who may be authorized to grant the same, while such felon shall reside in a place in which he lawfully may reside, under such sentence, order or remission, may sue for the recovery of any property acquired by him since his conviction, or for any damage or injury sustained.

#### SECTION V.

# Of Bankrupts and Insolvent Debtors.

Bankrupts are under no per-sonal disability.

THE disability to maintain a suit on account of alienage, outlawry and attainder, arises partly from the plaintiff being personally disqualified, and partly from his not being capable of holding the property which is the object of the suit. The disability accruing from bankruptcy arises from the latter cause only, or rather from the fact that by the bankruptcy, all the bankrupt's property, whether in possession or action, is vested in his assignees (k) (1),

Leach's Cr. Law, 99.

(k) Under the old Bankrupt Law, as embodied in 6 Geo. IV. c. 19, ss. 63, 64, the commissioners were directed to convey to the assignees all present estate of the bankrupt, whether real or personal, and all future

(i) 4 Bl. Com. 400; Gully's case, property which he might acquire previously to his obtaining his certificate; but now, by the Bankrupt Court Act, 1 & 2 Will. IV. c. 56, ss. 25, 26, all the real and personal property of the bankrupt vests in his assignees by virtue of their appointment.

⁽¹⁾ Story Eq Pl. § 726, § 495; Elderkin v. Elderkin, 1 Root, 139.

and a bankrupt, even though uncertificated, is not personally dis- Bankrupts. qualified from suing; and may in many cases sustain suits either at Law or in Equity.

Thus, under the old Bankrupt Law, if a bankrupt disputed his May sue at liability to the commission, or the validity of the adjudication under Law, in cerit, he might maintain trespass against his assignees (1), or trover for his books and papers (m); and it has been held that where assignees have employed the bankrupt on carrying on his trade or manufacture for the benefit of the estate, and paid him money from time to time, it is evidence of such a contract between him and the assignees as will enable him to maintain an action against them for a compensation for his work and labor (n). And so, as a bankrupt, though uncertificated, can acquire and hold property against every one except his assignees, he can maintain an action of assumpsit against a third person for his own work and labor performed (o), and for money lent or advanced (p) since the issuing of the commission or fiat; and where no claim is made by the assignees, he may also maintain trover for goods acquired after his bankruptcy (q), as well as trespass quare clausum fregit, for a trespass committed before his bankruptcy (r), for the defendant in any of these actions cannot object to the bankrupt's claim unless his assignees interfere, and the bankrupt in fact sues at Law as a trustee for his assignees (s).

tain cases;

In Equity also, a bankrupt who has not obtained his certificate, and in Equity; can file a bill to restrain a nuisance, or the infliction of any injury of a private or particular nature without making his assignees parties (t); and if sued at Law upon a bond or note, he is entitled to file a bill of discovery in order to obtain proof that such bond or note was fraudulently procured; the specific relief prayed is however material in determining whether the assignee is a necessary party to the bill, for where it prays that the instrument upon which the bankrupt is sued at Law may be delivered up, the assignee is a necessary party (u). Where persons claiming to be creditors of bankrupts, instead of seeking relief under the commission, brought an action against the bankrupts, and the bank-

⁽l) Perkin v. Proctor, 2 Wils. 382. (m) Summersett v. Jarvis, 6 Moore, 56; 3 B. & B. 2, S. C.

⁽a) Coles v. Barrow, 4 Taunt. 754.
(b) Chippendale v. Tomlinson, 1
C. B. L. Silk v. Osborne, 2 Esp.

⁽p) Evans v. Brown, 1 Esp. 170. (q) Fowler v. Down, 1 Bos. & P. 44; Laroche v. Wakeman, Peake,

^{140;} Webb v. Ward, 7 T. R. 296; Webb v. Fox, 7 T. R. 391.

⁽r) Clark v. Calvert, 3 Moore, 96. (s) Cumming v. Roebuck, 1 Holt, 172; 1 Deacon's Bankrupt Laws, 555.

⁽t) Semple v. London and Birmingham Railway Company, 9 Sim.

⁽u) Balls v. Strutt, 1 H. 136.

May have a discovery, where sued at Law;

but not for relief.

Cannot sue for any property vested in their assignees, even though they allege collusion between defendant and the assignees; or though the commission is invalid;

or for the surplus of his estate.

Theory of bankruptcy.

rupts filed a bill seeking a discovery in aid of their action, and praying that the accounts between them and the plaintiffs at Law might be taken, and that the plaintiffs at Law might pay the balance which upon taking such accounts might appear to be due from them, a plea of bankruptcy was overruled, Sir Thomas Plumer, V. C., being of opinion, that the bankrupts were entitled to the discovery and account, although they were not entitled to that part of the prayer which sought the payment to them of the balance (x).

In general, however, a bankrupt, although he is by law entitled to the surplus of his estate which remains after payment of his debts, cannot bring a bill in equity for any property, which is vested in his assignees under the commission, even though there may be collusion between them and the persons possessed of the property (y); thus, where a bill was filed by a bankrupt to recover property due to his estate, stating that the commission against him was invalid, and that there was a combination between his assignees and the debtor, to which a demurrer was put in, Sir J. Leach, V. C., allowed the demurrer, saying that if it had been true that the commission was invalid, the plaintiff ought to have tried its validity by an action, and could not by bill impeach the commission; and that if there were a combination between the debtor and his assignees, his proper course was to apply by petition to have the assignees removed, and new assignees appointed (z) (1).

In Spragg v. Binkes (a), it was held by Lord Alvanley, M. R., that a bankrupt cannot file a bill for the redemption of a mortgage in respect of his right to the surplus of his estate; and in Benfield v. Solomons (b), a demurrer was allowed to a bill by a bankrupt against a mortgagee of estates in England and Berbice, for an account and payment of the balance to the assignees, who were made defendants and charged with collusion.

The principle upon which these decisions are founded appears to be, that although the bankrupt is entitled to an account of the surplus of his estate, yet, "as the theory of bankruptcy is, that the

(z) Lowdes v. Taylor, 1 Mad. 423. This decision was afterwards affirmed on appeal, ibid. 425; 2 Rose, 432; and see Govet v. Armitage, 2 Anst. 412.

(y) An assignment under a commission of Bankrupt does not pass property belonging to the bankrupt as factor, executor, or trustee. Vide

Cook's B. L. ch. viii. § 15, 16, 17; vide etiam, 1 Deacon's B. L. c. ix. § 10, 222.

(z) Hammond v. Attwood, 3 Mad. 158; see also Yervens v. Robinson, 11 Sim. 105.

(a) 5 Ves. 587. (b) 9 Ves. 77; [Sumner's ed. note (a).]

party is a bankrupt, because he cannot pay his debts; the prima facie intendment, therefore, is, that he has no property "(c), all that he has is a mere right to an account from his assignees; but the presumption being that there is not enough for the creditors, he is not considered as having such an interest in the property sought as will entitle him to maintain a suit respecting it; so that prima facie the bankrupt has no demands. If, however, he states If assignees upon petition in bankruptcy that the apparent incumbrances upon tute a suit; his property are not substantial charges, and that the assignees are prevented by the creditors from interfering, or, if the creditors would permit them, refuse; or if both refuse to interfere and give or refuse to do him the chance of a surplus, the Court will say, with reference to so, the circumstance, that the bankrupt cannot sue, the law supposing that he has no interest in the property; yet that is not to be acted upon to the effecting of gross injustice. Therefore if he can give Bankrupt security for costs, the Lord Chancellor [or Court of Bankruptcy] must apply to Court of Bankwill order the assignees to permit him to use their names, to ena-ruptcy for ble him to recover the property upon his indemnifying them (d). leave to use their names.

As a bankrupt cannot file a bill against strangers respecting property vested in his assignees under the commission, so it has Cannot sue his been held that he cannot maintain a suit against his assignees for an account, an account of their receipts and payments under the bankruptcy, and for payment of the surplus. This doctrine was clearly laid down by Lord Eldon in Saxton v. Davis (e), and has recently undergone considerable discussion, in a case before Lord Abinger, C. B. (f), in which, after a very full argument, it was decided that in general the rule above laid down, that a bankrupt cannot file a bill against his assignees for an account of their dealings even though under the bankruptcy, applies as well to an uncertificated bank-uncertificated. rupt as to one who has obtained his certificate.

It is to be observed, that whatever property a bankrupt has, or, Bankrupt canto use a technical expression, may depart with, becomes, upon perty abroad; bankruptcy, the property of the assignees, who are to have it for the benefit of the creditors; and the circumstance of such property being in a foreign country where the bankrupt laws of this country do not prevail, makes no difference; so that a bankrupt cannot maintain a suit in this country, even though the property in respect of which the suit is instituted is in another country (g).

(c) 9 Ves. 86. (d) Per Lord Eldon in Benfield v. Solomons, 9 Ves. 84; vide etiam Spragg v. Binkes, supra. (e) 18 Ves. 72.

(f) Tarleton v. Hornby, 1 Younge

Bankrupts

[&]amp; Collyer, 17 Eq. Exchr.

(g) Sill v. Worswick, 1 H. Bl. 665; Hunter v. Potts, 4 T. R. 182; and Phillips v. Hunter, 2 H. B. 402; Benfield v. Solomons, 9 Ves. 77.

Bankrupts.

For by the 6 Geo. IV. c. 16, s. 64, it is directed, that the conveyance to be executed by the commissioners to the assignees shall be of all lands, tenements and hereditaments (except copyhold or customary) in England, Scotland, Ireland, or in any of the dominions, plantations or colonies belonging to his Majesty, to which any bankrupt is entitled, &c. with a proviso whereby it is directed that where according to the laws of any such plantation or colony such deed would require registration, enrolment or recording, the same shall be so registered, enrolled or recorded according to the laws of such plantation or colony; and no such deed shall invalidate the title of any purchaser for valuable consideration prior to such registration, enrolment or recording, without notice that such commission has issued. And by the Bankruptcy Court Act, 1 & 2 Will. IV. c. 56, s. 26, it is declared, that all the present and future real estate of any bankrupt, whether in the United Kingdom of Great Britain and Ireland, or in any of the dominions, plantations or colonies belonging to his Majesty, which by the above Act is directed to be conveyed by the commissioners to the assignees, shall vest in such assignees by virtue of their appointment, without any deed of conveyance for that purpose; and that as often as any assignee or assignees shall die or be removed or displaced, and any new assignee or assignees shall be duly appointed, such of the aforesaid real estate as shall remain unsold or unconveyed, shall, by virtue of such appointment, vest in such new assignee or assignees, either alone or jointly with the existing assignees, as the case may require, without any conveyance for the purpose. By the 27th sect. of the same Act, it is declared, that where according to the laws in force a conveyance of the property of a bankrupt would require to be registered, recorded or enrolled in any register office in England, Wales or Ireland, or in any registry office, court or place in Scotland, or any of the dominions or plantations belonging to his Majesty, a certificate of the appointment of the assignee in the form therein mentioned, shall be registered in the same place, and have the same effect as the registry, enrolling or recording of any conveyance or assignment of the bankrupt's estate or effects which, by the laws of the country, is required to be registered, recorded or enrolled, &c.

The rules with regard to bankrupts apply by analogy to insolvent debtors, who are equally considered as being devested of all right to maintain a suit in respect of any surplus to which they

may eventually be entitled (e). Thus, where a bill was filed by an insolvent debtor against his assignees under the 14 Geo. III. c. 77, and also against a debtor to his estate, stating collusion Cannot sue between them, and praying that the assignees might be removed their assignees for surplus of and that a specific performance of an agreement for a lease might their estates. be decreed against the debtor, to which bill a plea was put in by the debtor stating the assignment under the Act. &c., the plea was held to be good (f). The reasons for the judgment in that case are not given in the report; but it was considered by Lord Eldon as an authority for the rule, that an insolvent debtor is placed in the same situation as that in which a bankrupt is, viz. "that the order, disposition and management of the estate is so far taken out of the party, that he cannot sue in respect of the surplus " (g).

Insolvent Debtors.

But although neither a bankrupt nor an insolvent debtor can Secue, persons sue in respect of their interest in the surplus of the property, yet as claiming sursue in respect of their interest in the surplus of the property, yet as plus under an they have such an interest in the surplus as is capable of assign—assignment by ment, it seems that the persons claiming under such assignments, insolvent. if made for valuable considerations, may maintain bills respecting This appears to have been the opinion of Lord Alvanley, M. R., in Spragg v. Binkes (h), though his Lordship seems to have doubted whether the Court had not gone too far in permitting such assignments, and to have held, that a party could not parcel out a right in accounts to be taken to different persons, so that every one of those persons might file a bill pro interesse suo.

The disability of a bankrupt to maintain a suit, does not apply Certificated The disability of a bankrupt to maintain a suit, uoes not appry to a certificated bankrupt suing in respect of property acquired sue for prosubsequently to the allowance of his certificate; but by the 6 Geo. perty acquired IV. c. 16, it is enacted, that if any person who shall already subsequently to certificate. have been discharged by certificate, or who shall have com-unless in the pounded with his creditors, or who shall have been discharged by case of second bankruptcy, any Insolvent Acts, shall be or become bankrupt, and obtain his &c. certificate, such certificate, unless his estate shall produce, after all charges, sufficient to pay every creditor under the commission 15s. in the pound, shall only protect his person from arrest and imprisonment; but his future estate and effects, except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children, shall vest in the assignees under the commission, who shall be entitled to seize the

⁽e) Gill v. Heming, 1Ridg. P. C. 431; Spragg v. Binkes, 5 Ves. 583.

⁽f) Bowser v. Hughes, 1 Anst. 101. (g) 9 Ves. 85. (h) Supra.

Insolvent Debtors.

Difference in this respect between a bankrupt and insolvent.

By the Insolvent Act,

property of insolvent, which cannot be taken in execution, must be conveyed or assigned to assignee, and if insolvent refuses to convey or assign it, he is to be apprehended and committed till he does;

holder of the liver it up to the assignees. same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission.

In most respects the situation of an insolvent debtor, as far as regards the right to sue for property acquired previous to his discharge, is similar to that of a certificated bankrupt; but there is a material difference in their situations with regard to after-acquired property. A bankrupt may, as we have seen, after the allowance of his certificate, become entitled to property in the same manner that he might before his bankruptcy, unless it be the case of a second bankruptcy, where he has not paid 15s. in the pound; but in the case of an insolvent debtor, his future property is made liable to the payment of his debts contracted before his discharge. By the 57th section of the Act, before any adjudication is made,

the prisoner is to execute a warrant of attorney to authorize the entering up of a judgment against him, at the suit of his assignees, for the amount of the debts stated in his schedule, which judgment is to have the form of a recognizance; and if at any time it shall appear to the satisfaction of the Court that such prisoner is of ability to pay such debts, or any part thereof, or that he is dead leaving assets for that purpose, the Court may permit execution to be taken out thereupon for such sum of money as under all the circumstances of the case the Court shall after-acquired require, which sum is to be distributed rateably amongst the creditors of the insolvent; and by the 58th and 59th sections, where an insolvent shall after discharge become entitled to property which cannot be taken in execution under the judgment to be entered up on the before-mentioned warrant of attorney, the assignee may, in case the insolvent refuses to convey or assign such property, apply to the Court by petition, and upon such petition the Court may cause the insolvent to be apprehended and committed to custody until he transfers or assigns such property to his assignees; and in case any person shall become possessed of any stock or other property belonging to the insolvent, or held in trust for him, or for his use and benefit, or to which he shall be in any way entitled, or shall be in any manner indebted to such insolvent, the Court may, upon application of any assignee or creditor of the insolvent, cause notice to be given to such person, and the Court directing him to hold or retain the property till further order, and may direct the thereupon it shall be lawful for such Court to order such property property to de- to be delivered over to the assignee of the insolvent, for the general benefit of the creditors.

The effect of these clauses in the Act, it is to be observed, is not absolutely to vest the future property of the insolvent in his assignee, but merely to give the assignee, on application to the Court, power to get at it, and to apply it for the benefit of creditors. It would seem, therefore, that for such future property, a person who has taken advantage of the Insolvent Act, must be entitled to sue, at least till an assignment has been made to the assignee, pursuant to the provisions of the 58th section.

The proper course by which to take advantage of the bank- In what cases ruptcy or insolvency of the plaintiff in a suit, if such bankruptcy insolvency or insolvency has occurred previously to the filing of the bill, is should be taby demurrer, if the fact appears upon the bill (i) (1); and if ken advantage the fact does not appear, it should be pleaded. In Bowser v. rer; Hughes (k), which was the case of a plea to a bill by an insolvent debtor against his assignees and a debtor to the estate, the facts stated in the plea appeared upon the face of the bill, and yet the plea was held good; and it has been held, that as at Law any when it may matter which srises between the declaration and the plea may be be pleaded. pleaded, so bankruptcy or other matters arising between the bill and plea may be pleaded in Equity (1).

bankruptcy or

In pleading bankruptcy, all the facts should be stated succes- Form of a plea sively and distinctly; and it will not be sufficient to say that a of bankrupicy.

commission or fiat of bankruptcy was duly issued against the plaintiff, under which he was duly found and declared a bankrupt, and that all his estate and effects have been thereupon duly transferred to or become vested in his assignees (m); a plea of bankruptey must state distinctly the trading, the contracting debts, the petitioning creditor's debt, the act of bankruptcy, the commission or fiat, and the finding bankrupt. It was formerly necessary to state the assignment of the personal estate to the assignees; and if real estate was in question, it was required that the bargain and sale should be clearly mentioned (n). That part of the plea is now inapplicable, as in fact, under the Bankruptcy Court Act, no assignment or bargain and sale is necessary, all the real and personal estate of a bankrupt being, by the Act, vested in his assignees upon their appointment (o).

With respect to the bankruptcy of the plaintiff after the com- As to the effect mencement of a suit, or after plea and answer put in, there was a of bankruptcy of plaintiff af-difference between the practice of the Court of Chancery, and the ter suit com-

menced.

⁽m) Carleton v. Leighton, 3 Mer. (i) Benfield v. Solomons, 9 Ves. (n) Ibid. Arg. 669. (o) 1 & 2 Will. IV. c. 56, § § 25, (k) 1 Anst. 101. (l) Turner v. Robinson, 1 S. & S.

Effect of Bankruptcy or Insolvency. Court of Exchequer, arising from the latter Court having come to the conclusion that the bankruptcy of a plaintiff did not operate as an abatement of the suit (p). The abolition of the equitable jurisdiction of the Court of Exchequer renders it now unnecessary to state what was the practice of that Court. In Chancery, it seems, that the bankruptcy of a sole plaintiff does not strictly cause an abatement, but renders the suit defective (q); or according to the language of Lord Eldon in Randall v. Mumford (r), "this Court, without saying whether bankruptcy is or is not strictly an abatement, has said, that according to the course of the Court, the suit is become as defective as if it was abated."

Practice where plaintiff becomes bankrupt.

Defendant must move that assignees may file a supplemental bill within a given time, &c. It seems that the result in practice of the above principle is, that upon the non-prosecution of a suit, in which the plaintiff has become bankrupt, the defendant, if he wishes to get rid of the bill entirely, must adopt a course of proceeding analogous to that pursued where the plaintiff obtains an injunction and dies, in which case the defendant may move that the injunction be dissolved, unless the representatives of the deceased plaintiff revive within a certain time (s). He must move that the assignees may, within a fortnight after notice of the order, file a supplemental bill against him, or in default thereof, that the plaintiff's bill may stand dismissed (1). This is, however, not a motion of course, and the assignees must be served with it. It should also be supported by an affidavit of facts (t), and it is to be observed, that the dismissal will be without costs, as a bankrupt cannot be made to pay costs (u).

The suit is considered on the one hand as so far abated, that the defendant cannot make the ordinary motion to dismiss; and in Sellas v. Dawson (x), Lord Thurlow held, that such an order made, pending the bankruptcy of the plaintiff, was a nullity; and therefore refused to discharge one obtained under such circumstances: on the other hand, it is not so completely abated, as that the assignees, if they wish to continue it, can do so by bill of revivor, but they must file a supplemental bill for that purpose.

The rule of practice by which a defendant is required to give

(s) Wheeler v. Malins, 4 Mad. 171;

Lord Huntingtower v. Sherborn, 5 B. 380

(t) Porter v. Cox, 5 Mad. 80. (u) Wheeler v. Malina, 4 Mad. 171; Lee v. Lee, 1 Hare, 621.

(z) 2 Ans. 458.

⁽p) Bramhall v. Cross, cited 2 Anst. 459; Davidson v. Butler, ib. 460, n.; Randall v. Mumford, 18 Ves. 426.

⁽q) Lee v. Lee, 1 Hare, 621. (r) 18 Ves. 427.

⁽¹⁾ See Story Eq. Pl. § 349, and note; Sedgwick v. Cleveland, 7 Paige, 287, 290; Garr v. Gomez, 9 Wendell, 649; 2 Barbour, Ch. Pr. 65, 66.

notice to the assignees in the case of the bankruptcy of a plain-tiff, is confined to the case of a sole plaintiff, who, becoming Insolvency. bankrupt, is supposed to be negligent of what is sought by the bill, and the Court, to prevent surprise and save expense, requires Where banknotice to be given to the assignees; but there is no instance rupt is not sole plaintiff, dewhere the Court has taken upon itself to interpose the rule where fendant may there are two plaintiffs, one of whom is solvent and the other move to disinsolvent, for it is as competent to the solvent plaintiff as it is to the assignees to rectify the suit (*).

In the case of injunctions granted at the suit of a plaintiff who Practice as to afterwards becomes bankrupt, the course of proceeding appears injunctions. to be somewhat different from what it is under ordinary circum-In such case, the practice which the Court of Chancery has adopted is to require the bankrupt to bring his assignees before the Court by bill of revivor, or supplemental bill in the nature of a bill of revivor, or by whatever name it is called; and the Court will make an order to dissolve the injunction and dismiss the bill, unless the assignees shall be brought before it within a reasonable time (z), which order it seems, may be served upon the bankrupt alone, as it is supposed that the bankrupt will find the means of giving his assignees notice (a). Such an order will also be without costs.

It is proper in this place to notice a point which has been much As to suits by discussed, and upon which there appears to have existed consid-assignees erable diversity of opinion, especially between the Courts of concurrence of Exchequer and Chancery, viz. the right of the assignees of a the creditors. bankrupt to institute a suit without the concurrence of the creditors, or rather with respect to the right of the defendant to avail himself of the omission of the assignees to obtain such concurrence, and the manner in which he is to insist upon such right.

By the 5 Geo. II. c. 30, s. 38, it was provided, that no suit in Equity should be commenced by any assignee or assignees, without the consent of the major part in value of the creditors of such bankrupt, who should be present at a meeting to be held pursuant

difficult to justify an order that, if the assignees are not brought before the Court in a reasonable time, the injunction shall be dissolved, perhaps before the certificate, and in the plainest case for upholding the injunction between those parties."

(a) Randall v. Mumford, 18 Ves. 424; Wheeler v. Malins, 4 Mad. 171.

⁽y) Caddick v. Masson, 1 Sim. 501; Latham v. Kenrick, ibid. 502. (z) Randall v. Mumford, 18 Ves. 424. It ought, however, to be observed, that although Lord Eldon stated the practice to have been as above, yet, he also observed, that "There are many suits that a bank-rupt may maintain; and if he shows a clear case for an injunction, it is

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to notice given in the London Gazette for that purpose; and by the 6 Geo. IV. c. 16, by which the 5 Geo. II. c. 30, is repealed, it is enacted (b), that the assignees, with the consent of the major part in value of the creditors, who shall have proved under the commission, present at any meeting, may do certain acts therein specified, and that no suit in Equity shall be commenced by the assignees without such consent as aforesaid, provided that if one-third in value or upwards of such creditors shall not attend at any such meeting, (whereof such notice shall have been given as aforesaid,) the assignees shall have power, with the consent of the commissioners testified in writing under their hands, to do any of the acts aforesaid.

The first reported case in which the right of the defendant in Equity to avail himself of the omission on the part of the plaintiff to procure the necessary consent of the creditors under the 5 Geo. II. c. 30, s. 38, was that of Ocklestone v. Benson (c), which came before Sir John Leach, V. C., upon a plea, when his Honor allowed the plea, observing, that if the creditors are not bound by the result of a suit which is commenced by the assignees without the consent of the creditors, then it is not fit that the defendant should be vexed in a suit, which, at the pleasure of the creditors, may be to him fruitless; and that, if the creditors are bound by such a suit, then it is fit that a plea should be favored which is in furtherance of the purposes of the statute. The same question was afterwards raised in Bevan v. Lewis (d), in which case there was no plea, nor was the point raised by the answer, but the objection was taken at the hearing and overruled by Sir A. Hart, V. C., who said, that as the objection now insisted on had not been raised by the answer, he was not at liberty, upon reading the record, to assume that the assignees had not had the assent of the creditors.

Objection by defendant, for want of consent of creditors.

In Bozon v. Williams (e), which occurred in the Exchequer upon a plea, the judgment was in favor of the plea, chiefly upon the authority of the decision which had been come to in Ocklestone v. Benson. Sir W. Alexander, L. C. B., in pronouncing the judgment on that occasion said, "That if it had been the case of a demurrer he would have presumed all proper measures to have been taken under the Act, but where the question was put directly in issue by a plea, and it was in the power of the plaintiff to reply to such plea and put the matter in a course of

⁽b) Sect. 88. (c) 2 S. & S. 265.

⁽d) 2 Glyn & Jameson, 245.(e) 2 Young & J. 475.

trial, he felt that he was not at liberty to pronounce the provisions of the Act to have been complied with."

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After the above case was decided by the Lord Chief Baron, the same point again came under the consideration of the Court of Chancery, upon a demurrer to a supplemental bill, which had been filed by the assignees (f). The defendant, in his answer to an original bill filed by the assignees, had insisted upon the fact of the original bill not having been filed with the consent of the creditors, &c., as required by the Act, whereupon the assignees filed a supplemental bill, stating, that since the filing of the original bill, they had obtained the necessary assent, to which supplemental bill the defendant demurred, and the V. C. of England allowed the demurrer on the authority of Ocklestone v. Benson, before cited. In Jones v. Yates (g), however, Sir William Alexander, L. C. B., overruled a demurrer to an original bill, exhibited by the assignees of a bankrupt, on the ground that the assent required had not been obtained, and in doing so his Lordship said, "There is, certainly, great advantage in requiring a plaintiff to state his rights accurately on the record; but it seems to me very questionable whether the Act of Parliament intended that the assignees should be stopped from instituting a suit without the consent of the creditors, or only intended to provide, as between the assignees and the creditors, that the assignees should be responsible if they instituted any suit without the consent directed by the Act. In point of fact, the assignees by the assignment to them, get the species of interest which would enable them to institute any action or suit; but then comes the prohibition in the Act. Now, whether that mere prohibition is to have the effect of depriving the assignees of the right which their situation would otherwise give them, or has only the effect of rendering them liable to the creditors for the consequences of any action or suit instituted without their consent, is very questionable. I promised to speak to the other Judges about the demurrer: I have done so, and I am now disposed to overrule the demurrer, but without costs. I have spoken to both the Master of the Rolls Objection by and the Vice-Chancellor, and if those learned Judges continue of defendant, for want of conthe opinion now entertained by them, a different rule will for the sent of credifuture prevail in the Court of Chancery." It is to be observed, tors. that in a subsequent case before the V. C. of England (h), his Honor decided, in conformity with Ocklestone v. Benson, but that in a case which afterwards occurred before Sir John Leach,

⁽f) King v. Tullock, 2 Sim 469. (g) 3 Y. & J. 373.

⁽k) Smith v. Biggs, 5 Sim. 391.

Suits by Assignees. M. R., in which an objection upon the above ground was taken at the hearing, his Honor said that he had had an opportunity of conversing with some of the Judges at Common Law upon the point, and their impression was according to the inclination of opinion which he had expressed at the hearing, viz. that the provision made in the statute was to be considered as made for the benefit of the creditors alone, and that it was not competent to the defendant to take advantage of the objection that the suit had been instituted without the consent of the creditors (i).

As to suits by assignees of insolvents without the the creditors.

With reference to this point it is to be observed, that the Insolvent Debtors' Act, 1 Geo. IV. c. 119, contains a clause nearly to the same effect as that in the Bankrupt Act above referred to. concurrence of By the 11th sect. it is enacted, "that no suit at Law be proceeded in further than an arrest in mesne process, or suit in Equity be commenced by any assignee or assignees of any such prisoner's estate and effects, without the consent of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice to be given, &c. for that purpose, and without the approbation of the commissioners of the said Court;" and the Court of Common Pleas has expressed an opinion, that this clause does not make it necessary for an assignee under the Act to prove at the trial of an action brought by him on account of the insolvent's estate, that he was authorized in the manner prescribed by the above section. In delivering the opinion of the Court, Lord Chief Justice Best said, "If an action is brought without the proper authority, this Court might perhaps stop it on motion, or the Insolvent Debtors' Court might order their officer to suspend or discontinue it. I doubt, however, whether either Court should interfere on the application of a defendant; he can in no way avail himself of this provision in the Act, as it was not made for his benefit. I am convinced he can make no use of it at the trial of an ejectment brought against him" (k). In a subsequent case, which arose upon the construction of the present Act for the relief of insolvent debtors (1), the Court of Common Pleas was of opinion, upon the same grounds, that the 16th section of that Act was only confirmatory of the assignee's right to sue, and that he might sue without the order of the Court of Insolvent Debtors required by that section (m).

> In this place it is right to notice another section in the Insolvent Debtors' Act, which has been the subject of much discussion in

⁽i) Piercy v. Roberts, 1 Mylne & Bing. 203. (l) 7 Geo. IV. c. 57. (k) Doe dem. Clark v. Spencer, 3 (m) Dance v. Wyatt, 6 Bing. 486.

the Court. By the 7 Geo. IV. c. 57, s. 26, it is enacted, "that whenever any such assignee or assignees shall die or be removed, and a new assignee or assignees shall be appointed in pursuance Effect of the of the provisions of this Act, no action at Law or suit in Equity death of assignee and apshall be thereby abated, but the Court in which any action or suit pointment of is depending, may upon the suggestion of such death or removal new one; and new appointment, allow the name or names of the surviving or new assignee or assignees to be substituted in the place of the in cases of informer; and such action or suit shall be prosecuted in the name solvency. or names of the said surviving or new assignee or assignees, in the same manner as if he or they had originally commenced the same (n)." Under this section an application was made to the Vice-Chancellor for leave to substitute the name of a new provisional assignee as a defendant, in lieu of a provisional assignee who had been originally made a defendant, but had been removed from his office, and an order was made to that effect (o); but upon a similar application being made to the Court of Exchequer, Lord Lyndhurst, C. B., said, that the section applied only to the case of the assignee being plaintiff, and not where he is defendant (p); and in a subsequent case before Lord Brougham, the opinion of Lord Lyndhurst was confirmed (q); so that the rule may now be taken to be settled, that the section in question applies only to cases where the assignee or assignees fill the character of plaintiffs, and that it extends to the provisional assignee of the Court, as well as to assignees otherwise appointed under the Act.

As the Bankrupt Act, 6 Geo. IV. c. 16, contains a section (r) Death of asnearly in the same words with that above quoted from the Insol-ses of bankvent Debtors' Act, it is presumed that the same rule will apply to ruptcy. assignees of a bankrupt. According to the old practice with regard to them, where some died or some were discharged, and others, by order of the Court, put in their room, the new assignees might have had the benefit of the former suit by filing a supplemental bill, but now, by the above Act, whenever an assignee who is a plaintiff in a suit shall die, or a new assignee or assignees shall be appointed, no action at Law or suit in Equity will be thereby abated, but the Court may, upon the suggestion of such death, &c., allow the name of the new assignee or assignees, to be substituted in the place of the former, and the action or suit to be prosecuted in the name or names of the surviving or new as-

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⁽n) A similar section occurs in the Bankrupt Act, 6 Geo. IV. c. 16, § 7. (o) Gilchrist v. Renten, Younge E. R. 387, n.

⁽p) Bainbridge v. Blair, ibid.386. (q) Mendham v. Robinson, 1 Mylne & Keen, 217.

⁽r) Sect. 7.

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signee or assignees, in the same manner as if he or they had originally commenced the same.

Of suits by assignees, where one partner only is bankrupt.

By sect. 89 of the Bankrupt Act, 6 Geo. IV. c. 16, in any commission against one or more of the members of a partnership, the assignees may upon obtaining the order of the Lord Chancellor, prosecute any suit or action in the name of such assignees and of the remaining partner or partners, against any debtor of the partnership, and may obtain such judgment, decree or order, as if the action or suit had been instituted with the consent of the other parties.

Former pracin support of commission.

It was formerly necessary in all actions where the assignees, tice as to proof either as plaintiffs or defendants, claimed property under the bankrupt, to prove strictly the three requisites to support the commission; viz. the trading, the act of bankruptcy, and the petitioning creditor's debt, as well as that the commission was regularly issued, and the assignment duly executed. Upon failure of proving any one of these matters, (the proof of which adds considerably to the costs of an action, and is often difficult to be established by strict rules of evidence,) the assignees were nonsuited, and thus frequently prevented from recovering a just debt due to the bankrupt's estate. To provide in some measure for this evil, the 49 Geo. III. c. 121, ss. 10, 11, enacted, that the commission and proceedings should be evidence of the petitioning creditor's debt, the trading and act of bankruptcy, unless the other party, before a particular period of the suit, should give notice of his intention to dispute them. But this, it seems, did not afford an effectual check to the vexatious defence so frequently set up to actions brought by assignees, notwithstanding the defendant was liable to pay the costs of forcing them to prove these several matters on the trial. The legislature therefore thought it expedient to enact, that in certain cases no such proof should be required from the assignees; and in others, that the depositions of these matters before the commissioners should be conclusive evidence, confining in reality the former general obligation, of proof under the old system, to what may now be considered as excepted cases under the new. Thus, by section 90 of the 6 Geo. IV. c. 16, it is declared, that in any action by or against an assignee, or any commissioner or person acting under the warrant of the commissioners, for anything done as such commissioner or under such warrant, no proof shall be required at the trial, of the petitioning creditor's debt, the trading or act of bankruptcy, unless the other party in such action shall (if defendant, at or before pleading, and

Enactment as to notice of intention to dispute the commission, &c. in actions at Law.

if plaintiff, before the issue joined,) give notice in writing to such assignee, commissioner or other person, that he intends to dispute some, and which of such matters. And the party giving notice renders himself liable to the costs occasioned by it, if the disputed matter is proved by the other party upon the trial. By section 91, also, a similar provision is made as to suits In suits in in Equity, by or against the assignees, unless the party in the suit Equity. shall, within ten days after rejoinder, give notice in writing to the assignees of his intention to dispute; in which case, if the assignees shall prove the matter so disputed, the costs occasioned by the notice are, in the discretion of the Court, to be paid by the party giving it. These two clauses, it will be perceived, are not (like those in the former statute) (s) confined to actions and suits by or against the assignees, but extend to those against the commissioners or any person acting under them. There is also a Difference bematerial difference in the enactments; the former statute provid-tween former ing that in case of no notice being given, "the commission, and enactments. the proceedings of the commissioners under the same, shall be evidence to be received" of the petitioning creditor's debt, the trading and act of bankruptcy, while the present statute declares, that "no proof shall be required at the trial" of those matters (t).

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It is to be observed, moreover, that where the assignees sue for When deposia debt or demand for which the bankrupt might himself have tions made sued, the 5 & 6 Vict. c. 122, takes away from the defendant all idence. power whatever of contesting those proceedings after a certain period allowed the bankrupt to dispute the validity of the commission, for by section 24 it is enacted, that if the bankrupt shall not (if he were within the United Kingdom at the date of the adjudication) within twenty-one days after the advertisement of the bankruptcy in the London Gazette; or (if he were at any other part of Europe at the date of the adjudication) within three months after such advertisement; or (if he were elsewhere at the date of the adjudication) within twelve months after such advertisement, have commenced an action, suit or other proceeding to dispute or annul the fiat, and shall not have prosecuted the same with due diligence and with effect, the Gazette containing such advertisement shall be conclusive evidence in all cases as against such bankrupt, and in all actions at Law or suits in Equity brought by the assignees for any debt or demand for which such bankrupt might have sustained any action or suit had he not been adjudged bankrupt, that such person so adjudged

⁽a) 49 Geo. III. c. 121, § 10, 11. (t) 1 Deacon's Bankrupt Law, 757.

Suits by Assignees. bankrupt became a bankrupt, before the date and suing forth of such fiat, and that such fiat was sued forth on the day on which the same is stated in the Gazette to bear date, saving all rights accrued previous to the commencement of the Act.

It is to be noticed, that this section of the Act extends only to those cases in which an action or suit is brought by the assignees for any debt or demand for which the bankrupt himself might have sustained a suit; in those cases, therefore, in which the bankrupt himself, supposing he had not become one, would have had no right to maintain a suit, as in the case of a suit brought by the assignees to recover back the payment of a debt made by the bankrupt to his creditor, after his knowledge of an act of bankruptcy, or after the issuing of the commission or fiat: the Act does not deprive the defendant of the right to dispute the petitioning creditor's debt, the trading and act of bankruptcy at any time, upon giving the requisite notice of his intention to do so (u).

It is also to be observed, that the term conclusive evidence, as applied in the Act to the depositions taken before the commissioners, must be understood as only applying to the facts contained in the depositions, and not to the conclusion of law drawn by the witnesses or the commissioners from them (x); for though no evidence can be produced to contradict the facts deposed to, yet if the depositions on the face of them are not legal proof of the petitioning creditor's debt, and of the trading and act of bankruptcy, they cannot be received in evidence, notwithstanding they have been considered as proved by the commissioners. Thus, though the deposition of the witness to prove the act of bankruptcy will be conclusive evidence of the time when the bankrupt did a certain act, and of the fact itself, it will not be evidence of its amounting to an act of bankruptcy. So the deposition of the petitioning creditor will be evidence of a certain sum due to him, and also of the character in which he claimed it, whether as executor or assignee; nor will it be necessary in either of these cases to produce the probate or the assignment (y); but whether the sum due was a debt to support a commission, that is an inference of law which the Court upon the trial will not be estopped from determining by the adjudication of the commissioners. So, if a deposition state that the deponent witnessed the execution of a deed by the bankrupt, by which he assigned his property to

⁽u) 1 Deacon, 777; with respect to (y) Skaife v. Howard, 2 B. & C. 6 Geo. IV. c. 16, § 92. (z) 1 Deacon, 777.

Though this is evidence of such a deed as stated in the Suits by Asdeposition (z), yet it is not evidence that the deed itself was an act of bankruptcy.

The whole effect, indeed, of the provision of the statute is only to make the depositions evidence, not to declare the fact of the bankruptcy to have been proved, for this must be as strictly made out by the depositions, as it would be required to be done by witnesses (a).

And it is to be remarked, that where the defendants to a suit Infant defenbrought by the assignees of a bankrupt, or any of them, are dants may disinfants, they will be entitled to dispute the validity of the bank-dity of the ruptcy, without giving the notice required by the Act. This was bankruptcy, without notice. decided by Sir J. Leach, V. C., in the case of Bell v. Tinney (a), in which a bill was filed by the assignees of a bankrupt to set aside a settlement which had been made by the bankrupt upon his wife and children. There was no other evidence of the bankruptcy but the commission, which the counsel for the plaintiff insisted was sufficient under the 9 Geo. III. c. 121, s. 11, but the Vice-Chancellor held, that as there were infant defendants he would not bind them, by the want of the notice required by the Act; and directed an inquiry before the Master, whether a commission had been duly issued against the bankrupt.

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(a) 4 Mad. 372.

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⁽z) Kay v. Stead, 2 Star. 200. (a) Rawson v. Haigh, 1 Car. 80; Machin, 1 Bing. 426; Marsh v. Mea-and per Abbott, C. J., 2 B. & C. 560; ger, 1 Star. 353. Clarke v. Askew, 1 Star. 458; Law-

## CHAPTER III.

## PART II.

OF PERSONS WHO ARE DISQUALIFIED FROM SUING ALONE.

# SECTION I.—Of Infants.

WE come now to the consideration of those disqualifications which only incapacitate a person from maintaining a suit alone, but do not prevent his suing in Equity, provided his suit be supported by another person. Such disqualifications arise from infancy, idiocy, lunacy or imbecility of mind, and marriage. With respect to infants, idiots, lunatics, and persons of weak minds, the law considers that by reason of the immaturity or imbecility of their intellects, they are incapable of asserting or protecting their own rights, or of forming a judgment as to the necessity of applying for protection or redress to the tribunals of the country; it therefore requires that whenever it is necessary that application should be made on their behalf to a Court of justice, such application should be supported by some person who may be responsible to the Court, that the suit has not been wantonly or improperly instituted. With respect to married women, their incapacity does not arise from want of reason (a), but from the circumstance that by the law of this country the property of all women in a state of coverture vests in the husband, the consequence of which rule is, that no suit can be maintained by the wife without her husband being joined as a co-plaintiff with her.

In those cases, however, in which, by the peculiar doctrines of a Court of Equity, she is considered entitled to property separate and distinct from her husband, if it should so occur that her interests are in opposition to those of her husband, Courts of Equity will permit her to sue in her own name, but then some person must be joined with her in the suit, who may be responsible for the costs of the proceedings, in case it should appear that the suit has been improperly instituted or conducted.

has been improperly instituted or conducted.

In the present Section, the attention of the reader will be

(a) Co. Litt. 346 a & b.

directed to the peculiarities in the practice of the Court, arising Of Infancy. from the circumstance of the party, or one of the parties suing, being an infant.

The laws and customs of every country have fixed upon particular periods at which persons are presumed to be capable of acting with reason and discretion. According to the law of this country, a person is styled an infant until he attains the age of twenty-one years, which is termed his full age (b) (1).

An infant attains his full age on the completion of the day It terminates which precedes the twenty-first anniversary of his birth; but, as the day before the 21st annithe law will make no fraction of a day, he may do any act which versary of his he is entitled to do at full age, during any part of such day. birth. Thus it has been adjudged, that if one is born on the 1st of February, at eleven at night, and on the last day of January, in the twenty-first year of his age, at one of the clock in the morning, he makes his will of lands and dies, it is a good will, for he was then of full age (c) (2).

Although for many purposes an infant is under certain legal Infants may incapacities and disabilities, there is no doubt that a suit may be sustain suits. sustained in any Court, either of Law or of Equity, for the assertion of his rights or for the security of his property, and for this purpose a child has been considered to have commenced his existence as soon as it is conceived in the womb. Under such Infants en vencircumstances it is termed in Law an infant in ventre sa mere, and tre sa mere, may sue to rea suit may be sustained on its behalf, and the Court will, upon strain waste. application in such suit, grant an injunction to restrain waste from being committed on his property (d) (3).

In Robinson v. Litton (e), Lord Hardwicke seems to have considered that the point that a Court of Equity would grant an injunction to stay waste at the suit of an infant en ventre sa mere, though it had often been said arguendo, had never been decided;

(d) Musgrave v. Parry, 2 Vern.

(3) Story Eq. Pl. § 59, note.

⁽b) Jacob's Law Diet. tit. Infant. (c) Anon. Salk. 44, Sir R. How-(e) Rebinson v. Litton, 3 Atk. 209; see also Wallis v. Hodson, 2 Atk. ard's case, ibid. 625. 117.

⁽¹⁾ The age of majority of females is fixed by the constitution of Vermont at eighteen years. Young v. Davis, Brayt. 124; Sparhawk v. Buel, 9 Vermont, 41.

^{(2) 1} Jarman on Wills, (1st Am. ed.) 37; Herbert v. Torball, 1 Sid. 142; S. C. Raym. 84.

As to fractions of a day, and when they will or will not be regarded in the law, see D'Obree, Ex parte, 8 Sumner's Vesey, 83, note (a); Lester v. Garland, 15 ib. 248, note (d).

Suits on behalf but it seems that, though Lord Hardwicke was not aware of the of Infants. circumstance, such an injunction was actually granted by Lord Keeper Bridgman (f).

Infants cannot performance of contract.

But although an infant may maintain a suit for the assertion of sue for specific his rights, he can do nothing which can bind himself to the performance of any act: and therefore, where from the nature of the demand made by the infant it would follow that, if the relief sought were granted, the rules of mutuality would require something to be done on his part, such a suit cannot be maintained.

Thus it has been held, that an infant cannot sustain a suit for the specific performance of a contract, because in such cases it is a general principle of Courts of Equity to interpose only where the remedy is mutual, and if a decree were to be made for a specific performance, as prayed on the part of the infant, there would be no power in the Court to compel him to perform it on his part, either by paying the money or executing a conveyance (g).

Infants must sue by their next friend.

Although an infant, as we have seen, in general is capable of maintaining a suit, yet on account of his supposed want of discretion, and his inability to bind himself and make himself liable to the costs, he is incapable of doing so without the assistance of some other person who may be responsible to the Court for the Bill filed with. propriety of the suit in its institution and progress (1). Such person is called the next friend of the infant, and if a bill is filed on behalf of an infant without a next friend, the defendant may move costs to be paid to have it dismissed with costs, to be paid by the solicitor (2). a case, however, where a bill was filed by the plaintiff as an adult,

out a next friend, dismissed with by the solicitor.

> (f) Lutterel's case, cited Prec. Ch. 50. (g) Flight v. Bolland, 4 Russ. 298.

In Bouche v. Ryan, 3 Blackf. 472, it was held that an infant plaintiff is not liable for costs. See ib. note. But in Smith v. Floyd, 1 Pick. 275, it was held, that an infant plaintiff who sues by his next friend is liable for costs, to

the defendant who prevails in the suit.

⁽¹⁾ Story Eq. Pl. § 57; Hoyt v. Hilton, 2 Edw. 202. Where a complain-(1) Story Eq. Pl. § 57; Hoyt v. Hilton, 2 Edw. 202. Where a complainant files a bill as an infant, infancy is a material allegation, and must be proved or admitted by the answer. Boyd v. Boyd, 6 Gill & John. 25. See Shirley v. Hagar, 3 Blackf. 228, and note; Hanly v. Levin, 5 Ham. 227.

(2) So at law an infant must sue by his next friend. M'Giffin v. Stout, Coxe, 92; McDaniel v. Nicholson, 2 Rep. Con. Ct. 344; Bouche v. Ryan, 3 Blackf. 472; Judson v. Blanchard, 3 Conn, 579.

In New York, a prochein amy must be appointed for an infant plaintiff before process is sued out. Wilder v. Ember, 12 Wendell, 191; 2 Rev. Stat. 446, § 2. See Matter of Frits, 2 Paige, 374; Fitch v. Fitch, 18 Wendell, 513. In Massachusetts, the next friend will be admitted by the Court without any other record than the recital in the Court. Miles v. Boyden, 3 Pick. 213. See Rev. Stat. Mass. ch. 79, § 8. See also Trevet v. Creath, Breese, 12; Judson v. Blanchard, 3 Conn. 579.

In Bouche v. Byan, 3 Blackf. 479, it was held that an infant plaintiff:

and it was afterwards discovered that he was an infant at the time Suits on behalf of filing the bill, and still continued so; whereupon the defendant moved that the bill might be dismissed, with costs to be paid by But in some the plaintiff's solicitor, the Vice-Chancellor made an order that cases leave will be given the plaintiff should be at liberty to amend his bill by inserting a to amend. next friend (h).

When an infant claims a right or suffers an injury on account of which it is necessary to resort to the extraordinary jurisdiction of the Court of Chancery, his nearest relation is supposed to be the person who will take him under his protection, and institute a suit to assert his rights or to vindicate his wrongs; and it is for this reason that the person who institutes a suit on behalf of an infant is termed his next friend. But as it frequently happens Who may be that the nearest relation of the infant himself withholds the right, prochein amy. or does the injury, or at least neglects to give that protection to the infant which his consanguinity or affinity calls upon him to give, the Court, in favor of infants, will permit any person to institute suits on their behalf (i), and whoever thus acts the part which the nearest relation ought to take, is also styled the next friend of the infant, and is named as such in the bill (k). And Guardian. it is to be observed, that although an infant has a guardian assigned him by the Court, or appointed by will, yet where he is plaintiff, the course is not to call the guardian by that name, but to call him the next friend, &c (1). But where the infant is defendant the guardian is so called (2), and if the guardian be so called where the infant is plaintiff, it is no cause of demurrer (1).

As any person may institute a suit on behalf of an infant (3), it

(h) Ibid. (i) Andrews v. Cradock, Prec. in Cha. 376; Anon. 1 Atkyns, 570.

(k) Lord Red. 20. (1) Toth. 9; Prac. Reg. 244.

⁽¹⁾ An infant may sue by his next friend notwithstanding he have a guardian, if the guardian do not dissent. Thomas v. Dike, 11 Vermont, 273. See Trask v. Stone, 7 Mass. 241. The general guardian of infants cannot file a bill in his own name to obtain possession of the property of his wards. But he must file it in the name of the infants as their next friend. Bradley v. Amidon, 10 Paige, 235.

⁽²⁾ It is commonly said, that in Equity an infant must defend himself, as (2) It is commonly said, that in Equity an infant must defend himself, as at law, by his guardian; but that he cannot sue by his guardian, but only by his next friend. By his guardian is here to be understood his guardian ad litem, admitted by the Court for this purpose. Story Eq. Pl. § 58, note (3). The Court never appoint a guardian to prosecute for, but only to defend, an infant party. Priest v. Hamilton, 2 Tyler, 44.

(3) In New York the next friend may be appointed by the Chancellor, a Vice Chancellor, or a Master. 2 Rev. Stat. 446, § 3.

The appointment is made upon the petition of the infant, and the written consent of the person proposed to be appointed, duly acknowledged before.

consent of the person proposed to be appointed, duly acknowledged before, or proved to the person, making the appointment. 2 Rev. Stat. 446, § 4.

of Infants.

Reference to inquire whether a suit is for the benefit of infant.

Where there are two or more suits.

Suits on behalf frequently occurs that two or more suits are instituted in his name, by different persons, each acting as his next friend; in such cases the Court will direct an inquiry to be made by one of the Masters, as to which suit is most for his benefit; and when that point is ascertained, will stay the proceedings in the other suit (m) (1); and it is a motion of course that such a reference should be made (n). If upon the reference, the Master finds that the second suit is the most proper to be prosecuted, and the consequence is that there is one bill filed, which will be beneficial to the infants to prosecute, and a subsequent bill filed which will be more beneficial to be prosecuted, the ordinary practice of the Court is to stop the first suit, and to give costs to the next friend, although the first suit is not so beneficial to the infants as the second (o). In Campbell v. Campbell (p), Lord Cottenham said, "That if a person takes upon himself to file a second bill, it is incumbent upon him to show some defect in the first suit, or a decided preference in the second, and that if the merits of the two suits are only equal, the priority Moreover, as a check to the general license to must prevail." institute suits on behalf of infants, the Court will, if it is represented that a cause preferred in the name of an infant is not for his benefit, order a reference to the Master to inquire concerning And if upon such inquiry it is reported the propriety of the suit. that the suit is not for the benefit of the infant, either the proceedings will be stayed (q), or else, if there is no excuse for the fact of the suit having been instituted, the bill will be dismissed with costs, to be paid by the next friend (r); and in the case of Sale v. Sale (s), where it appeared clearly upon affidavits that the suit was commenced by the next friend, to promote his own views, and not for the benefit of the infant, Lord Langdale, M. R., summarily, and without a reference to the Master, made such an order.

(m) Lord Red. 21.

(1) Story Eq. Pl. § 60.

n) Per Lord Eldon, 7 Dec. 1816, MSS., and where one of the suits is attached to the Lord Chancellor, and the other to the Master of the Rolls, the motion may be made before the Master of the Rolls. Starten v. Bartholomew, 5 Beav. 372.

(o) 6 Beav. 145. (p) 2 M. & C. 30.

(q) Lord Red. 21; see also Da Costa v. Da Costa, 3 P. W. 140; and Richardson v. Miller, 1 Sim. 133.

(r) 1 Beav. 383. (s) 1 Beav. 386.

A variance from this mode prescribed by the Statute may be allowed in certain cases, as where the infant is too young to sign a petition, or is in ventre sa mere. Matter of Frits, 2 Paige, 376. The next friend may be required to give a bond for the security of the infant in the matter of the suit, when it is to recover any debt or damages. 2 Rev. Stat. 446, § 5. This security may be a security may be a security may be security. curity may, however, be dispensed with, in a proper case, in the discretion of the Court or officer. Matter of Frits, 2 Paige, 374.

And in a case before Lord Brougham, where an application was Suits on behalf made, on behalf of the defendants, that the next friend of the infant plaintiff might be restrained from further proceeding with the suit, and for a reference to the Master to appoint a new next friend to conduct it in his stead; which application was supported by strong affidavits, to show that the suit had in fact been instituted from improper motives, for the purpose of benefiting the solicitor, at whose request the person named as next friend, (who was a stranger to the family, and had lately held the situation of farm servant or bailiff at monthly wages,) had consented to act as such, his Lordship directed the Master to inquire not only whether the suit was for the benefit of the defendant, but whether the next friend was a fit and proper person to be continued in that charac-The Master was also directed to inquire who would be the proper person to conduct the suit, in case the next friend was removed, and to report special circumstances (t).

The result of the cases seems to be that according to the language of Lord Langdale, M. R., in Starten v. Bartholomew (u), the Court exercises a very careful discretion on the one hand, in order to facilitate the proper exercise of the right which is given to all persons to file a bill on behalf of infants, and on the other to prevent any abuse of that right and any wanton expense to the prejudice of infants.

No reference, however, as to the propriety of the suit, will be Reference not ordered at the instigation of the next friend himself, because the granted on application of the Court considers, that in commencing a suit, the next friend un-prochein amy; dertakes on his own part that the suit, he has so commenced, is for the benefit of the infant (x).

This rule, nevertheless, applies only to cases where an applica- unless made in tion is made for such a reference in the cause itself; if there is another suit. another cause pending by which the infant's property is subject to the control and disposition of the Court, such a reference is not only permitted, but is highly proper, when fairly and bona fide made, and may have the effect of entitling the next friend to repayment of his costs out of the infant's estate, even though the suit should turn out unfortunate, and the bill be dismissed with costs (y).

It is to be observed that reports made upon references of this Master's redescription cannot be excepted to; thus in a case where it had port, upon been referred to a Master to see whether a suit instituted on be-such reference, cannot

be excepted to;

⁽t) Nalder v. Hawkins, 2 M. & K. 243

 ⁽x) Jones v. Powell, 2 Mer. 141.
 (y) Vide Taner v. Ivie, 2 Ves. 466.

⁽u) 6 Beav. 144.

# Persons disqualified from suing alone:

Some may be obrected to on

E Pre motion to comfirm it.

of Intents.

Suits on behalf half of infants by a prochein any was necessary, with liberty to the Master to state special circumstances, &c., and the Master by his report stated several circumstances, and certified the suit to be una necessary; upon a motion to confirm the report, and dismiss the bill, the counsel for the next friend entered into observations on the evidence before the Master, and it was at first doubted whether this would not be a more proper subject for exceptions to the port, but the registrar, Mr. Dickens, being consulted, declared it to be the practice of the Court not to except to reports of this kind (which were in the nature of cases for the opinion of the Court), but to object to them on the motion to confirm (z).

w here soliciar names pro-- A ein amy a thout his Privity.

In the same case the counsel for the prochein amy alleged that the suit had been instituted by the solicitor entirely, without his privity or consent; but the Lord Chancellor was of opinion, that in the then stage of the business, the Court could not take notice of the question as between the prochein amy and the solicitor, but must take it to be the act of the prochein amy, who ought to make a direct application against the solicitor if he had acted improp-

If an infant is made a co-plaintiff with others in a bill, and it appears that it will be more for his benefit that he should be made f striking out a defendant, an order to strike his name out as plaintiff, and to Programme of an make him a defendant, may be obtained upon motion (b); and it is to be observed, that an infant heir at law, against whose estate defendant, and defendant, a charge is sought to be raised, ought to be made a defendant, and not a plaintiff, although he is interested in the charge when raised; and that where an infant heir had, under such circumstances, been FEE What cases made a coplaintiff, Lord Redesdale ordered the cause to stand wer, with herty for the plaintiffs to amend, by making the heir at it a de kindant instead of plaintiff, and thereupon to prove the sett. curent anew against him as a defendant (c). The reason given by the reporter for this practice is, because an infant defendant, where his inheritance is concerned, has in general a day given him and attaining twenty-one, to show cause, if he can, against the derive (d), and is in some other respects privileged beyond an adult: but an infant plaintiff has no such privilege, and is as

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much hound as one of full age (e). , to Whittaker v. Marlar, 1 Cox, a) Whittaker o. Marlar, 1 Cox, 1) Tappers v. Norman, 11 Ves. " Plunket v. Joice, 2 Scho. &

Will. IV. c. 47, § 11, the concerning suits against infinite.

privilege of an infant heir or devisee to have a day to show cause against a decree for the selling the estate of his ancestor or devisor, for payment of his debts, is taken away.

(c) Lord Brook v. Lord Hertford,
2 P. Wms. 519; see also Morison s.

Morison, 4 M. & C. 216; and post,

Although however an infant is in general bound by a decree in Suits on behalf a cause in which he himself is plaintiff, yet there is no instance of the Court binding the inheritance of an infant by any discretionary Where any act; from this principle it follows, that where an infant heir is discretionary plaintiff, it is not the practice to establish the will, or to declare it to be done by well proved, although it seems that if there be no question raised the infant to bind his inherconcerning its validity, the Court may in some respects act upon itance. it (k).

According to this doctrine, in Lord Brook v. Lord Hertford, Practice in caabove referred to, which was the case of a bill filed by an infant tion. plaintiff for a partition against a co-tenant in common, although the Court decreed a partition, it would not direct any conveyance to be made until the infant plaintiff attained twenty-one (i); and so in Taylor v. Philips (k), where it had been referred to the Master to see whether certain proposals which had been made as to the surrender of a copyhold estate by the infant plaintiff were reasonable, and for the infant's benefit; and the Master reported that they were so, the Court, nevertheless, would not make the order for the surrender without inserting the words "without prejudice to the plaintiff, the infant, after he shall attain the age of twenty-one years " (1).

In general, however, where decrees are made in suits by infant Of giving an plaintiffs, it is not usual to give the infant a day to show cause; infant plaintiff and in Gregory v. Molesworth (m), Lord Hardwicke observed, cause, that he knew but of one case that was an exception, viz. that of Lady Effingham v. Sir John Napier (n), where upon an appeal from Lord Macclesfield's decree with regard to real estate, the House of Lords gave Sir John Napier leave to show cause, when he came of age, against his own decree. It is observable, how-unless under ever, that the order in that case was made under very peculiar peculiar circircumstances: a bill had been filed on behalf of Sir John Napier. an infant, by his prochein amy claiming as heir in tail under a settlement, to set aside a post-nuptial settlement made by his father on his wife, Lady Effingham Howard; and a cross bill had been filed by Lady Effingham against Sir John Napier and the trustees,

a day to show

(h) Hills v. Hills, 2 Y. & C. 327.
(i) Where decrees are made for partitions, and some of the parties are infants and others adult, the practice now is, not to direct any mutual conveyances to be executed by any of the parties till all the infants shall have become of age, and have had an op-portunity of showing cause against the decree; and in the mean time the decree only extends to make the par-

tition, give possession, and order enjoyment accordingly, till effectual conveyances can be made. Vide the decree in Agar v. Fairfax, 17 Ves. 545, 554; Attorney-general v. Hamil-(k) 2 Ves. 23. (l) Belt Supp. to Vesey, 259. (m) 3 Atk. 626. (n) 2 P. Wms. 401; 3 Bro. P. C.

340; Mos. 67.

of Infants.

is a bill and

cross bill.

Suits on behalf to have a conveyance made to her and her heirs of the estates comprised in the settlement. Both cases came on to be heard at the as where there same time, and a decree was made, from which both parties appealed, and the order made by the House of Lords was inter alia that as to so much of the decree as ordered Sir John Napier's bill to be dismissed so far as the same sought to set aside the settlement, the same should be affirmed, with this addition : -- " Unless Sir John should, within six months after his attaining his age of twenty-one, show cause to the Court of Chancery to the contrary." It was also ordered that the trustees should convey the estates in the settlement to Lady Effingham and her heirs, unless Sir John Napier should, on attaining twenty-one, show good cause to the contrary to the Court of Chancery. Now, it is to be observed, that the relief granted by the latter part of the order was the relief prayed by Lady Effingham's cross bill, and must have been made in consequence of that suit; it was therefore perfectly regular in that part of the decree to give Sir J. Napier, who was a defendant in the suit, a day to show cause against it; and such being the case, it would have been very absurd not to have given him an opportunity of showing cause against that part of the decree which dismissed his own bill, by which he sought to impeach the settlement, as by so doing the Court would in one part of the decree have given him an opportunity of controverting it, which by other parts of the decree, they would have deprived him of. The result of the case of Lady Effingham v. Napier, was, that when Sir John Napier came of age he preferred a petition, supported by affidavits to the Lord Chancellor, for liberty to file a new bill, or to amend his former bill, and also to amend his answer to the cross bill, on the ground that the cause had been greatly mismanaged by his solicitor, upon which the Lord Chancellor King, having called to his assistance Sir Joseph Jekyll, M. R., ordered that Sir John Napier should be at liberty to amend his answer in the cross suit, or to put in a new one, and should have time till the first day of next Term; but as no precedent appeared for amending a bill after the same had been dismissed upon the merits, that part of the petition was refused, but liberty was given him to rehear both the causes, which were ordered to stand over till after the time for amending the answer, or putting in a new answer had expired (o).

In what manner an infant plaintiff shows cause.

When a day is given to an infant plaintiff to show cause against a decree after he comes of age, the proper course appears to be to

⁽o) Mos. 67; 2 P. Wms. 401; 3 Bro. P. C. 340.

have the cause reheard, for which purpose he must, within the Suits on behalf of Infants. period appointed, present a petition of rehearing (p)

Though an infant is, in ordinary cases, bound by the effect of Infant not any suit or proceedings instituted on his behalf, and for his benefit, yet if there has been any mistake in the form of such suit, or conduct of his of the proceedings under it, or in the conduct of them, the Court cause, or the will, upon application, permit such mistake to be rectified (1).

form of the

Thus, an infant plaintiff may have a decree upon any matter Infant may arising from the state of his case, though he has not particularly have the relief he is entitled mentioned and insisted upon it, and prayed it by his bill; and ac- to, though not cordingly where a bill was filed on behalf of an infant, claiming, prayed for, ss eldest son of his grandfather's heir at law, the benefit and possession of an estate, and to have an account of the rents, profits, &c., and for general relief; and, upon the hearing, an issue was directed to try whether his father was legitimate, which the jury found he was not; so that the plaintiff's claim as heir at law was defeated: he was yet allowed to set up a claim to part of the estate, to which it appeared that he was entitled under certain deeds or insisted upexecuted by his grandfather, but which claim was in no way raised on. or insisted upon by his bill, although the Court said it might have been otherwise if he had been adult (q). And where the persons acting on behalf of an infant plaintiff, by mistake make submissions or offers on behalf of the infant, which the infant ought not to have been called upon to make, the Court will not suffer the infant to be prejudiced. Thus, where an infant plaintiff had, by Not bound by mistake, submitted by her bill to pay off a mortgage, which she improper subwas not liable to pay, the Master of the Rolls said he must take their behalf. care of the infant, and not suffer her to be caught by any mistake of her agent; and therefore, the infant was allowed to amend her bill, on paying the costs of the day (r).

– by a de-

In general, however, in matters of practice, infants as well as But bound by satults are bound by the conduct of the solicitor acting bona fide from practice in their behalf (s). Thus, where in a case of pedigree, the solicitor bona fide, asconcerned for the infant concurred in the use of affidavits before sented to. the Master instead of interrogatories, Sir Thomas Plumer, M. R., held that the infants were thereby bound; and although the Court. will not in general make any decree by consent where infants are cree taken by consent.

⁽p) Prac. Reg. 225. (q) Stapilton v. Stapilton, 1 Atk. 6; vide etiem De Manneville v. De Manneville, 10 Ves. 52.

⁽r) Serle v. St. Eloy, 2 P. Wms. 386.

⁽s) Tillotson v. Hargrave, 3 Mad.

of Infants.

--- or by an order without reference;

Suits on behalf concerned, without referring it to a Master to inquire whether it will be for their benefit; yet when once a decree is pronounced without that previous step, the authority of it is the same as if it had been referred to the Master, and he had made a report that it it would be for their advantage. So an order for maintenance, though not usually made without reference to a master, yet if made without, will be equally binding (t).

but not by an admission of facts stated in a case.

Any person may be pro-chein amy;

It seems to have been the opinion of Lord Eldon, that facts could not be stated in a case for the opinion of a Court of Law so as to bind infants (u).

It has been before stated, that any person, who may be willing to undertake the office, may be the prochein amy of an infant; and it seems that even a person who has been outlawed in a civil action may fill that character (z), although it is doubtful whether a prochein amy can sue in forma pauperis (y).

Need not be a person of substance.

Not removable for poverty.

It is stated in some of the books that a prochein amy must be a responsible person (z), or a person of substance, on account of costs, but the better opinion seems to be, that it is not necessary that he should be so (a). It certainly does not appear that the Court has ever gone to the extent of removing the prochein amy of an infant, or of staying proceedings in the suit, on the mere ground of his supposed poverty (1); and Lord Thurlow, upon an application for that purpose being made to him, is reported to have said that he doubted whether a next friend ought to be discharged on account of poverty more than a principal. His Lordship observed, "that the principle upon which a plaintiff, if poor, would not be deprived of the opportunity of applying to the Court for justice, is similar to that of getting a next friend to sue. Suppose an infant had a father, who is the natural friend, to sue for him, would the Court refuse to hear that father?" (b). In Squirrell v. Squirrell (c) (which appears to be a report of the same case as that above referred to, though it is somewhat differently stated), the application appears to have been, that the prochein amy should

(t) Per Lord Thurlow, Wall v. Rushby, 1 Bro. C. C. 487.

(u) Hawkins v. Luscombe, 2 Swa. 392.

(z) Gilb. For. Rom. 54.
(y) Page 43. [But see note and

case of Fulton v. Rosevelt, 1 Paige, 178.]

(z) Lord Red. 21; 1 Stra. 708. (a) Davenport v. Davenport, 1 S. & S. 101.

(b) Anon. 1 Ves. J. 409.(c) 2 Dick. 765.

⁽¹⁾ Where a person who prosecutes a suit in the name of an infant as his next friend is insolvent, he will be compelled, on the application of the defendant, to give security for costs. Fulton v. Rosevelt, 1 Paige, 178; Dalrymple v. Lamb, 3 Wendell, 424.

give security to answer costs; and Lord Thurlow, acting upon the

opinion of Mr. Dickens, the Registrar, denied the motion.

Of Prochein Amies.

It is certainly stated in a book of considerable authority upon the practice of the Court of Chancery, viz., the Practical Register (d), that where a suit was by a prochein amy not able to answer costs, the Court ordered that another should be named; but it is not stated whether the bill was filed on behalf of an infant. or of a married woman, between whose cases there exists in this respect a very important distinction, arising from the circumstance that a suit on behalf of an infant may be filed by any one for the infant's benefit, whereas the suit of a feme covert is substantially her own suit, and her next friend is selected by herself, and is ap- Secus, in the pointed for the express purpose of answering the costs, which cannot be recovered against a married woman by any process (e) (1). of a feme cov-

If the next friend of an infant does not do his duty, or if any ert. other sufficient ground be made out, the Court will order him to Prochein amy removable for be removed (f) (2). Thus when the next friend will not proceed non performwith the cause, the Court will change him (g). And an applica- ance of his duty, tion for the purpose may be made by the solicitor in the cause, describing himself as solicitor for the infant plaintiff (h).

And although a next friend may not have been actually guilty or by reason of of any impropriety or misconduct, yet if he is connected with the adverse interdefendants in the cause in such a manner as to render it improba-est. ble that the interest of the plaintiff will be properly supported, the Court will remove such next friend, and either refer it to the Master to appoint another in his place, or if it is proved by affidavit, Reference to that a man of substance, wholly unconnected with the parties, the Master to appoint a new and who would employ a solicitor similarly situated, is willing to proches amy, undertake the office of next friend, the Court will appoint him immediately, without reference (i).

In the same case it appeared that the solicitor for the infants Of the same acted for the father also, and had been for ten years his confiden- solicitor acting for next friend tial solicitor; and the Vice-Chancellor said, that although he was and for the de-

his having an

fendants.

⁽d) Ed. Wyatt, 349. (s) Pennington v. Alvin, 18. & S.

⁽f) Russell v. Sharp, 1 Jac. & W. 482.

⁽g) Ward v. Ward, 3 Mer. 706. Furtado v. Furtado, 6 Jur. 228.

⁽i) Peyton v. Bond, 1 Šim. 391.

See Fulton v. Rosevelt, 1 Paige, 180.
 Where the next friend, who had filed a bill on behalf of an infant, was

a person in low circumstances and of immoral character, and there was reason to suppose, that he had instituted the suit from spite against one of the defendants, the bill was ordered to be taken off the file, with costs to be paid by the next friend. Walker v. Else, 3 Bland, 234.

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warranted by high authority in saying that in family suits it was proper that the same solicitor should be employed for all parties; yet the Court will watch with great jealousy a solicitor who takes upon himself a double responsibility, and if it sees a chance of his miscarrying, will take care, where the plaintiffs are infants, that he shall not stand in that relation to a defendant under circumstances of very adverse interest; and, upon this ground, his Honor decided that the solicitor for the father ought not to continue in the character of solicitor of the next friend (k).

Prochein amy cannot be a receiver in the cause.

It may be here remarked that the prochein any of an infant cannot be permitted to act as receiver in the cause; and that where an application was made on behalf of infant plaintiffs, that the next friend might be at liberty to go before the Master, and propose himself to be the receiver, Sir Thomas Plumer, V. C., refused to accede to the motion, although it was consented to, observing, that it was the duty of the next friend to watch the accounts and conduct of the receiver, to be a control over him; and that the two characters were incompatible, and could not be united (1).

Prochein amy misconducting himself.

If the next friend of an infant takes any proceeding in the cause which is incompatible with the advancement of the suit, such as moving to discharge an attachment issued by the solicitor in the regular progress of the cause, the Court will refer it to the Master to see if it is fit that such next friend should continue in that capacity any longer (m). But as long as the next friend continues such on the record he is considered by the Court as responsible for the conduct of the cause, and for this reason Sir T. Plumer, M. R., on a petition being presented to him on the part of the infant plaintiff, complaining of great delay in prosecuting the decree, refused to refer it to the Master to inquire into the cause of the delay and to appoint proper persons on behalf of the infant to assist in taking the accounts, saying, "that if there had been misconduct, he would assist the petitioner, but that it must be in a regular way" (n).

Prochein amy not be a witness.

The next friend of an infant plaintiff was considered as so far or his wife can- interested in the event of the suit, that neither he (1) nor his wife could be examined as a witness (o) (2). But it would appear as if

(n) Russell v. Sharp, ubi supra.

(l) Stone v. Wishart, 2 Mad. 64. (m) Ward v. Ward, 3 Mer 706.

(o) Head v. Head, 3 Atk. 511.

But see Lupton v. Lupton, 2 John. Ch. 614.
 Where it becomes necessary, that the Plaintiff's next friend should be examined in the case, he may be discharged for that purpose, and another appointed in his place. Helms v. Franciscus, 2 Bland, 544; Colden v. Haskins, 3 Edw. 311.

this disability has been removed by stat. 6 & 7 Vict. c. 85, intitled Of Prochein "An Act for improving the Law of Evidence."

In general a next friend will not be allowed to retire without giv- Cannot retire ing security for the costs already incurred (p) (1). And where security for the new next friend, proposed in the notice of motion to be sub-costs already stituted in the room of the one to be withdrawn, was alleged to be incurred; in indigent circumstances, and an inquiry was asked for as to whether he was a proper person to act in that capacity with a view to his circumstances, the Vice-Chancellor stated as his reason for refusing such inquiry, that he would be at liberty to file a new bill (q).

In Melling v. Melling (r), Sir John Leach, V. C., refused to Cannot be reallow another next friend to be substituted for the one who had up moved at their to that time conducted the suit in that capacity, and who desired without a reto withdraw himself, without a previous reference to the Master. ference. to inquire whether it was for the benefit of the infant that such substitution should take place, with liberty to state special circumstances, "as it might be that the suit was improper, or had been improperly conducted; and the next friend was not thus to escape from costs to which he might be liable."

And in Harrison v. Harrison (s), Lord Langdale M. R. observed, that "although any person may commence a suit as next friend of an infant, when once here in that character, he will not be removed unless the Court is informed of the circumstances and respectability of the party proposed to be substituted in his place, and that such person is not interested in the subject of the suit;" and accordingly he required the production of an affidavit to that effect before the order was made.

When the prochein amy of an infant dies pending the suit (t), Proceedings the proper course of proceeding appears to be for the solicitor of on death of the plaintiff to apply to the Court for leave to appoint a new prochein amy in his stead; and after such appointment the name of the new prochein amy should be made use of in all subsequent proceedings, where the former one, if alive, would have been named. If the plaintiff's solicitor omits to take this step within a reasonable time, the Court will, upon motion or petition, make

⁽p) Lord Red. 21. (g) Davenport v. Davenport, 1 S. & S. 101.

⁽r) 4 Mad. 261.

⁽s) 5 Beav. 130. (t) Gilb. For. Rom. 54.

⁽¹⁾ Witts v. Campbell, 12 Vesey, 493; Davenport v. Davenport, 1 Sim. & Stu. 101; Colden v. Haskins, 3 Edw. 311.

Of Prochein Amies.

an order to refer it to the Master to approve of a new next friend, and notice of the order will be directed to be given to the plaintiff's solicitor. An order of this description was made in Lancaster v. Thornton (u), on the authority of a like order by Lord Hardwicke (v), and the precedent has since been followed by Sir John Leach, V. C., in Bracey v. Sandiford (x), where the application was made after a decree obtained in the cause; and by the V. C. of England, in the case of Glover v. Webber (y), where the application was made previous to decree.

Effect of infant plaintiff attaining twenty-one.

Where a bill has been filed in the name of an infant, his coming of age is no abatement of the suit (z); but he may elect whether he will proceed with it or not. If he goes on with the cause, all future proceedings may be carried on in his own name, and the bill need not be amended or altered (a). He will also be liable to all the costs of the suit, in the same manner that he would have been had he been of age when the bill was originally filed (b) (1). If he chooses to abandon it, he may move to dismiss it on payment of costs by himself; but he cannot compel the prochein amy to pay the costs unless it be established that the bill was improperly filed (2). Thus, where an infant, on attaining twenty-one, moved to dismiss a bill filed on his behalf, with costs Prochein amy's to be paid by the prochein amy, the Court refused to make the order, but directed the bill to be dismissed on the late infant plaintiff giving an undertaking to pay the costs of the next friend (c).

If, however, the next friend of an infant should die during the

lisbility to costs.

> (u) Amb. 398. The same case is reported in 1 Dick. 346; though apparently not accurately. See also Countess of Shelburne v. Lord Inchiquin,

> Amb. 398 n. (v) Ludolph v. Saxby, Amb. 398.

(z) 2 Mad. 468.

(y) 12 Sim. 351. (z) Prac. Reg. 225. (a) Moor. 42; Prac. Reg. 225; 1

Fowler, E. P. 421.

(b) Cowp. E. P.

c) It is apprehended that the Court in this instance meant that the infant could not compel the prochein amy to pay the costs. The infant not being answerable for the costs, was not injured by the institution of the suit. The prochein amy, therefore, was not answerable to the infint, but only to the defendant. Beames on Costs, 111, n. 1.

ty-one he adopts the proceedings and elects to prosecute the suit. Waring v. Crane, 2 Paige, 79. See Story Eq. Pl. § 59.

(2) If the suit was improperly brought, and the infant, on coming of age, elects to abandon it, he may apply for a reference to ascertain the fact, and the bill will then be dismissed with costs to be paid by the next friend. War-

ing v. Crane, 2 Paige, 79.

But if the bill was properly instituted for the benefit of the infant, and at twenty-one he elects to abandon it, he must upon the dismissal of the bill pay the costs of his next friend, as well as those of the adverse party. Waring v. Crane, 2 Paige, 79.

⁽¹⁾ Where a bill is filed on behalf of an infant by his next friend, the infant cannot be personally charged with costs, unless when he arrives at twen-

minority of the plaintiff, who, after he comes of age, should take Of Prochein no step in the cause, and the defendant should bring the cause on again, and procure the bill to be dismissed; such dismissal must be without costs, because the plaintiff not having been liable to costs during his infancy, and never having made himself responsible by taking any step in the cause after attaining twenty-one, and there being no next friend to be responsible for them, there is no person against whom the Court can make an order for payment of costs. This point was decided by Lord King in Turner v. Turner (d) upon a rehearing, although, on the former hearing, his Lordship was of a different opinion (e).

In that case the prochein amy if living, would of course, have been liable to the payment of the costs to the defendant, the general rule being that the prochein amy shall pay the defendant's costs of dismissing the plaintiff's bill; and so if a motion is made on behalf of an infant plaintiff which is refused with costs, such costs must be paid by the prochein amy (f) (1).

But the rule that a prochein amy is to be liable to the costs of dismissing a bill, or of an unsucessful motion, is to be considered only with reference to his situation with regard to the defendant in the cause. For the Court is extremely anxious to encourage, to every possible extent, those who will stand forward in the char- Costs as beacter of prochein amy on behalf of infants (g), and will therefore, tween prochein amy and defenwherever it can be done, allow the next friend the costs of any pro- dant. ceeding instituted by him for the infant's benefit, out of the infant's Of his right to estate, provided he appears to have acted bona fide for the benefit of costs out of the estate. the infant. Therefore where a suit was instituted on behalf of an in- Where the defant, in which there was a decree made, under which the money re- fendant who is covered was brought into Court, and put out for the benefit of the in- to pay the costs fant plaintiff, and the defendant was ordered to pay the costs, but ran away; upon a motion by the solicitor of the plaintiff (in which the father who was the prochein any, and very poor, joined) that his costs might be paid out of the fund in Court, Lord King granted the motion, but with some reluctance (h) (2). And in another Where the suit case when a supplemental bill had been filed on behalf of an in- is dismissed

⁽d) 1 Stra. 708. (g) Whittaker v. Marlar, 1 Cox, (e) 2 P. Wms. 297. f) Buckly v. Buckeridge, 1 Dick. (h) Staines v. Maddox, Mos. 319.

⁽¹⁾ Costs must be paid by the prochein amy in every instance where there is no foundation for the suit. Stephenson v. Stephenson, 3 Hayw. 193; Story Eq. Pl. § 59.

⁽²⁾ See Waring v. Crane, 2 Paige, 179.

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fant, for which there were apparent grounds, but which was eventually dismissed against one of the defendants with costs, which were paid by the receiver in the original cause; upon a petition by the prochein amy to be allowed such costs out of the infant's estate in the original cause, Lord Hardwicke made the order, observing that the next friend and the receiver had done nothing but what any man would do in his own case; and that though it had turned out unfortunately, the Court would not say that they ought to bear the costs; as if they were nobody would undertake the management of an estate for an infant (i).

Reference to inquire whether suit is for infant's benefit.

It is to be observed, that in the above case, after the supplemental bill had been filed, and the answer had come in, an application had been made on the part of the plaintiff in the original cause to refer it to the Master to inquire whether it was for the benefit of the infant to proceed in the suit, upon which the Master had reported that it would be for the benefit of the infant to carry it on against all the defendants: and that in pronouncing his judgment, Lord Hardwicke said that he had known bills to establish the custom of manors, in which it had been referred to the Master to inquire whether it was for the infant's benefit to carry it on (k) (1). It seems, however, from the case of Jones v. Powell (1), before referred to, that applications on the part of the next friend for a reference to the Master to inquire whether a suit which such friend has instituted was for the infant's benefit, cannot be made in the suit, respecting which the reference is sought; but that the prochein amy must carry it on at his own risk, which appears to be a proper restraint to prevent suits of this description from being rashly undertaken; for as on the one hand the prochein amy, in case a fund should be recovered by means of the suit, has, through his solicitor's lien for his costs upon that fund (m), an adequate protection from losing the charge he may have been put to by means of the suit, so the risk which he runs of losing those costs, in case the suit should be unsuccessful, tends to make persons cautious in undertaking proceedings of this nature on behalf of infants, without having very good reason for anticipating a successful result.

Reference whether suit for infant's benefit not made in the suit itself.

- (i) Taner v. Ivie, 2 Ves. 466.(k) Ibid. 469.

(l) 2 Mer. 141. m) Staines v. Maddox, Mos. 319.

⁽¹⁾ A suit may be commenced in the name of an infant without his knowledge or consent. The Court, however, on a proper application, will refer it to a Master to ascertain whether such suit is for the benefit of the infant; and if the Master reports that it is not for the benefit of the infant, will stay the proceedings. Fulton v. Rosevelt, 1 Paige, 178; Story Eq. Pl. § 60.

It is to be observed, however, that although the Court will so Of Prochein far encourage persons acting fairly or bona fide to institute proceedings on behalf of infants, or to protect them when it is possi- Prochein amy ble so to do from all costs and expenses which they may incur by not deprived of his right to such step, a protection which it will not suffer any degree of mis- costs, in contake or misapprehension to deprive him of (n), yet if it should turn sequence of out that he has acted from improper motives, or merely to answer misapprehenthe purposes of spleen, the principle which guides the Court in sion; encouraging an honest prochein amy, i. e. the anxiety to have af- but will not be encouraging an nonest process amy, v. e. suc analos, while entitled to fairs of infants properly taken care of, will involve a dishonest one costs if the in the expenses of his own proceeding (o). And so if it should suit was instiappear that in the case of an infant, due diligence has not been tuted from improper moexerted to acquire a proper knowledge of the facts of the case, tives, and the bill should be dismissed or an order discharged upon facts, or due diliwhich though not known when the bill was filed or the motion gence has not been used to made, might have been known if proper inquiry had been made, learn the facts the next friend will not be allowed the costs out of the infant's of the case. Thus where it appeared that a writ of Ne exect Regno estate (p). had been improperly obtained by the next friend, on motion supported by the affidavit of the infant plaintiff, by which the infant, who was of the age of eighteen years, swore positively to facts, which it appeared he could not have known himself, but which he could only have been told by other persons, the Lord Chancellor Thurlow discharged the order, and directed that the prochein amy should pay the costs of obtaining it (q).

There appears to be no doubt that a solicitor conducting a Solicitor has a cause on the part of an infant, has the same lien upon the money lien upon the fund for his recovered in the suit by his means, and at his expense, as he has costs, but not in the case of an adult (r); and therefore if the suit is successful, upon the pathe prochein amy is in general secure from being put to any pers. charges on the infant's behalf. But it seems that a solicitor who obtains possession of papers, as prochein amy, has not any lien upon them by virtue of such possession (s).

It is said that where a legacy is given to an infant, the testator Of the costs of makes it necessary to come into this Court for directions how to suing for an lay it out; and that therefore such an application ought to be con- acy. sidered as an incumbrance on the estate; and that the costs must. be paid out of the assets. This rule was acted upon in Whap-

⁽n) Whittaker v. Marlar, 1 Cox, 286.

⁽o) lbid; and see supra.

⁽p) Pearce v. Pearce, 9 Ves. 548.

⁽q) Roddam v. Hetherington, 5 Ves. 91.

⁽r) Staines v. Maddox, Mos. 319.

⁽s) Montagu on Lien, 53.

estate.

Of Prochein Not in future to come out of the testator's

ham v. Wingfield (t), by Sir W. Grant, M. R., who said that if the testator wishes to prevent the costs of such a suit from coming out of his estate, he ought to give the legacy to a trustee for the infant (u). His Honor, however, said that for the future he should not give the costs in such a case, for since the late Legacy Act, 36 Geo. III. c. 52, s. 32, the executor has nothing to do but, under that Act, to pay the legacy into Court, and then he has done; and the infant, when he comes of age, may petition for it. Before that Act an executor could not safely pay an infant's legacy without a decree.

but must be ecutor. Semble.

It is presumed that the rule above laid down will not apply so paid by the ex- as to prevent an infant legatee from receiving his costs, in case he is obliged to file a bill in consequence of the executor's omitting to avail himself of the Act to pay the money into Court, since there is no power given by the Act by which the executor can be compelled to pay the legacy without a suit. All that Sir W. Grant's dictum can mean is, that the expense of the suit shall not be thrown upon the residuary estate.

As to the right to costs beyond taxed costs.

With respect to the right of the next friend of an infant to receive anything beyond his taxed costs out of a general fund, in order to reimburse him for any extra expense he may have been put to, some difference of opinion appears to have existed between Lord Eldon and Sir W. Grant. In Osborne v. Denne (z), where a bill had been filed on behalf of an infant legatee and other plaintiffs, in which the usual decree was made, and the costs ordered to be taxed and paid out of the estate, an application was made to the Master of the Rolls on behalf of the prochein amy, that he might in some way have costs beyond his taxed costs, either by a direction to have them taxed as between solicitor and client, or by a reference to the Master to see what extra costs he had been put to; but the Master of the Rolls refused to make the order, saying that if a prochein amy is to a certainty to have all that exceeds the taxed costs, it would lead him to be very care-But in Fearns v. Young (y), where an application had been made to the Lord Chancellor for the costs of trustees, as between solicitor and client, his Lordship refused to make such an order, on the ground that where the costs of a trustee are directed to be taxed, that means as between party and party, not in the larger way, although where a trustee, in the fair execution of his trust, has expended money by reasonably and properly taking opinions, and procuring directions that are necessary for the due execution

⁽t) Anon. Mos. 5.

⁽u) 4 Ves. 630.

⁽z) 7 Ves. 424.

⁽y) 10 Ves. 184.

of his trust, he is entitled not only to his costs, but also to his charges and expenses, under the head of just allowances. "With regard to an infant," his Lordship said, "this requires great consideration, for as the infant himself cannot incur charges and expenses, if they cannot be claimed under just allowances, and the next friend is to be at the whole expense of the infant beyond his costs, persons will deliberate before they accept that office" (z).

Idiots and Lunatics.

## SECTION II.

## Idiots, Lunatics and Persons of Weak Minds.

Ir has been before observed, that although in certain cases Suits on their suits on behalf of idiots or lunatics may be instituted in the form properly by of informations by the Attorney-general, yet the proper course of bill. proceeding to assert their rights in Equity is by bill.

Bills on behalf of a lunatic are usually instituted in the name In the name of of the lunatic; but as he is a person incapable in Law of taking the lunatic, any step on his own account, he sues by the committee of his mittee. estate, who is responsible for the conduct of the suit (1). The Lunatic must lunatic, however, must be named a party, as well in a bill as in an be a party, uninformation on his behalf (2), unless the object of the suit be to to avoid his avoid some transaction entered into by himself on the ground of own acts. his incapacity at the time, in which case, it seems, that a lunatic ought not to be a co-plaintiff (3), because it is a principle of Law that no man can be heard to stultify himself (4). This distinction

(z) Fearns v. Young, 10 Ves. 184.

⁽¹⁾ See ante, 8, and note; Story Eq. Pl. § 64.

⁽²⁾ Story Eq. Pl. § 64, and note.

(3) A lunatic is not a necessary party plaintiff with his committee, on a bill to set aside an act done by the lunatic, under mental imbecility. Ortley v. Messere, 7 John. Ch. 139. "The general practice, however," it was remarked by Mr. Chancellor Kent, in this case, "is to unite the lunatic with the committee, as was done in 2 Vernon, 678. But there does not appear to be any use in it, or any necessity for it, as the committee have the exclusive custody and control of the estate and rights of the lunatic. The lunatic may be considered a party by his committee; and like trustees of an insolvent debtor, the committee hold the estate in trust, under the direction of the Court."

⁽⁴⁾ In reference to this maxim, it is remarked by Mr. Justice Story, "How so absurd and mischievous a maxim could have found its way into any system of jurisprudence, professing to act upon civilized beings, is a matter of wonder and humiliation. There have been many struggles against it in all ages of the common law by eminent lawyers, but it is somewhat difficult to resist the authorities which assert its establishment in the fundamentals of

of Idiots and Lanatics.

Suits on behalf was taken in the case of the Attorney-general v. Woolrich (a), which was the case of a bill, in the nature of an information, filed by the Attorney-general, for the benefit of a lunatic, to obtain the benefit of a marriage settlement entered into by him before his lunacy: to this bill the defendant demurred, on the ground that the lunatic was not a party to it, and the demurrer was allowed, the Lord Keeper Bridgman declaring it was as needful to make the lunatic a party, where a suit was on his behalf, as an infant; and a distinction is pointed out by the reporter between that case and the preceding case of Smith (b), in the same volume. "Smith's case was to be relieved against an act done by the lunatic in assigning a debt, because he was a lunatic at the time, so that if he had been a party, it would have been to stultify himself, which the law does not admit (c). In Woolrich's case the bill was to be relieved upon a marriage settlement, for the benefit of the lunatic before he was a lunatic; so that he being a party to that bill did not tend to stultify himself, and may be the reason why he should be a party to it; and the other bill tending to stultify himself, may be a reason why he should not be a party to it (d)."

When lunatic can sue to avoid his own acts.

It is to be observed, however, that where a bill is brought by a lunatic and his committee, to avoid an act of the lunatic's on the ground of insanity, a demurrer, on the ground that a lunatic could not be allowed to stultify himself, will not lie. This was decided by Lord King in Ridler v. Ridler (e), in which case a bill was brought by a lunatic and his committee, to set aside a settlement

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(d) Ridler v. Ridler. 1 Eq. Ca. Ab. 279.
  (a) 1 Cha. Ca. 153.
(b) Attorney-general v. Parkhurst,1 Cha. Ca. 112.
                                              (e) Ubi supra, p. 9.
(c) Vide Beverley's case, 4 Rep. 123.
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the common law." "Even the Courts of Equity in England have been so far regardful of the maxim, that they have hesitated to retain a bill to examine the point of lunacy," — " and formerly, they were so scrupulous in adhering to the maxim, that cases have occurred, in which a lunatic was not allowed to be a party to a bill to be relieved against acts done during his lunacy. But this rule is now with great propriety abandoned." 1 Story Eq. Jur. § 225.

In America this maxim has seldom if ever been recognised in any of the Courts of common law. Mitchell v. Kingman, 5 Pick. 431; Webster v. Woodford, 3 Day, 90; Grant v. Thompson, 4 Conn. 203; Lang v. Whiddon, 2 N. Hamp. 435; Seaver v. Phelps, 11 Pick. 304; McReight v. Aiken, 1 Rice, 56; Rice v. Peet, 15 John. 503; Chitty, Cont. (6th Am. ed.) 136, note (1).

In modern times the English Courts of Law seem inclined as far as possible to escape from the maxim. Baxter v. Earl of Portsmouth, 5 B. & Cresw. 170; Ball v. Mannin, 3 Bligh, (N. S.) 1; 1 Story Eq. Jur. § 225,

The ground on which Courts of Equity now interfere, to set aside the contracts and other acts, however solemn, of persons who are idiots, lunatics, and otherwise non compotes mentis, is fraud. 1 Story Eq. Jur. § 227.

which had been obtained from him by the defendant before the Suits on behelf issuing out of the commission of lunacy, but subsequently to the time when by the commission he was found to have been a lunatic, and the bill charged several acts of insanity and distrection previous to the making of the settlement and the issuing out of the commission, and charged likewise that the commission of lunscy was still in force. To this bill the defendant demurred, on the ground that it was against a known maxim of law that any person should be admitted to stultify himself, and because during the continuance of the lunacy he could not be supposed to know what he did; but the Lord Chancellor overruled the demurrer, and said that the rule that a lunatic should not be admitted to excuse himself on pretence of lunacy, was to be understood of acts done by the lunatic to the prejudice of others, but not of acts done by him to the prejudice of himself (1); "Besides," his Lordship observed, "here the committee is likewise plaintiff, and the several charges of lunacy are by him in behalf of the lunatic; and it has been always held, that the defendant must answer in that case."

of Idiots and Lanatios.

It was said by the Lord Keeper Bridgman, in the case of Attorney-general v. Woolrich, above referred to, that the reason why a lunatic is required to be a party to a suit instituted on his behalf, is because he may recover his understanding, and then he is to have his estate in his own disposition; but that it is otherwise of an idiot, from which it seems that an idiot is not a necessary party Idiot not a neto a suit instituted on his behalf. But neither an idiot nor a cessary party. lunatic can institute a suit, nor can one be instituted on their be- The committee half, without the committee being a party, either as a co-plaintiff of an idiot or or as a defendant (f) (2), and therefore, where the committee of a lunatic filed a bill on behalf of the lunatic without making himself a co-plaintiff, Sir Thomas Plumer, M. R., decreed the case to stand over, with liberty to amend, by making the committee a co-plaintiff (g); and in the Bishop of London v. Nicholls (h), a bill for tithes by the bishop and sequestrator during the incapacity of the incumbent, was dismissed, because the incumbent and his committee were not parties.

If a person exhibiting a bill appear upon the face of it to be In what cases either an idiot or a lunatic, and therefore incapable of instituting a demurrer will lie. a suit alone, and no next friend or committee is named in the bill,

⁽f) Fuller v. Lane, 1 Cha. Ca. 19. Feb. 17, 1894, MSS. (g) Woolfryes v. Woolfryes, Rolls. (k) Bunb. 141.

 ¹ Story Eq. Jur. § 226.
 Story Eq. Pl. § 64, and note.

Idiots and Lunatics. a Plea; to bill of discovery, as well as relief.

the defendant may demur (i); but if the incapacity does not appear on the face of the bill, the defendant must take advantage of it by plea (k) (1). The objection arising from lunacy, &c., extends to the whole bill; and advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief; for the defendant, in a bill of discovery, being entitled to costs, after a full answer, as a matter of course, would be materially injured by being compelled to answer such a bill by a person whose property is not in his own disposal, and who is therefore incapable of paying the costs (1).

Where plaintiff found lunatic after suit commenced,

or committee dies or changed, supplemental bill is necessa-TV.

Require sanction of Chancellor.

If the plaintiff become a lunatic after the institution of a suit, a supplemental bill may be filed in the joint names of the lunatic and of the committee of his estate, which will answer the same purpose as a bill of revivor in procuring the benefit of former proceedings (m). And if the committee of a lunatic's or idiot's estate die, after a suit has been instituted by him for the benefit of the idiot or lunatic, and a new committee is appointed, the proper way of continuing the suit is by a supplemental bill filed by the idiot or lunatic and the new committee.

A committee ought, previously to instituting a suit on behalf of an idiot or lunatic, to obtain the sanction of the Lord Chancellor to the proceeding, by a petition under the commission; and it is usual upon such petition being heard to refer it to the Master to inquire into the nature of the right or interest of the idiot or lunatic in the property claimed, and to certify whether any proceedings should be adopted for recovering it or for ascertaining his rights (n). If the Master reports that it will be proper a suit should be instituted, the committee will be ordered, in the name and on behalf of the lunatic, to file a bill in Chancery, or to take such other proceedings as the nature of the case may require (a).

Of setting aside contracts by lunatics.

It may be observed here, that the Court of Chancery will not, as a matter of course, interfere to set aside contracts entered into and completed by a lunatic, without fraud in the parties dealing with him (2), even where such contracts are overreached by the

(i) 1 Cha. Ca. 19; Ld. Red. 153. of such a bill is stated.

k) Lord Red. 229. I) Lord Red. 152.

(n) In re Reynolds, Shelf. on Lun. 417.

(m) See Brown v. Clark, 3 Wooddeson Lect. 378, notis, where the form In re Frank, ibid.

(o) In re Webb; In re Sir T. Smith;

⁽¹⁾ See Story Eq. Pl. § 725. On a libel for divorce for the adultery of the husband, it appearing that the libellee had become insane since the fact charged, the Court refused to proceed until a guardian was appointed. Mansfield v. Mansfield, 13 Mass.

^{(2) 1} Story Eq. Jur. § 227.

inquisition taken in lunacy, and may be void at Law: but the in- Idiots and Luterference of the Court will depend very much upon the circumstances of each particular case; and where it is impossible to exercise the jurisdiction in favor of the lunatic so as to do justice to the other party, the Court will refuse relief, and leave the lunatic to his remedy, if any, at Law (p). It seems also, that although a contract is entered into by a lunatic subsequent to the date from which he is found by the inquisition to have become lunatic, yet if the fact of his being a lunatic at the time of the contract is denied by the defendant, the establishment of that fact is indispensably necessary; and if the Court has any doubt upon it, it will direct an issue to try it (q) (1).

Persons of full age but who are incapable of acting for them- Persons of selves, though neither idiots nor lunatics, have been permitted to weak minds; sue by their next friend without the intervention of the Attorney-prochein amy. general (r); and it seems, that if a bill has been filed in the name Bill by imof a plaintiff who, at the time of filing it, is in a state of mental becile person taken off the incapacity, it may, on motion, be taken off the file (s) (2). If, file. however, a suit has been properly instituted, and the plaintiff sub- Secus, if filed sequently becomes imbecile, that circumstance will not be a suffibecome so. cient ground for taking the bill off the file. Thus, where a motion was made on the part of the defendant to take a bill off the file, on the ground of the plaintiff having been for some time reduced by age and infirmity to a state of mental imbecility, which rendered her incapable of instituting a suit; but the circumstances of the case' did not, in the opinion of Lord Eldon, warrant the inference that at the time of filing the bill she was incompetent to authorize the proceeding, and as the bill appeared to be a proper one with a view to her rights and interests, his Lordship thought, that as the suit was rightly commenced and the further prosecution of it proper, it would be a strong step even to stay the proceedings, merely because her state of mind was such

may sue by

(p) Shelf. on Lun. 418.

(q) Niell v. Morley, 9 Ves. 478.
(r) Lord Red. 23, cites Elizabeth
Liney, a person deaf and dumb by

others, in Ch. Dec. 1 Dec. 1760. Ditto on Supplem. Bill, 4 Mar. 1779.
(s) Wartnarby v. Wartnarby, Jac.

her next friend, against Witherly and

⁽¹⁾ Ex parte Wragg, 5 Sumner's Vesey, 450, 452, Mr. Hovenden's notes; Matter of Wendell, 1 John. Ch. 600.

⁽²⁾ A person in dotage, or an imbecile adult, may sue by next friend. C. D. Owing's case, 1 Bland. 373; Rothwell v. Bonshell, ib. See Story Eq. Pl. §. 66. See also Mansfield v. Mansfield, 13 Mass. 412, cited ante, 90, n.

Effect of Coverture.

that she could not revoke the authority previously given, but that to take the bill off the file and make the answer waste paper could not be done (t) (1).

## SECTION III.

## Married Women.

By marriage the husband and wife become as one person in law, and upon this union depends all the legal and equitable rights and disabilities, which either of them acquires or incurs by the intermarriage. One of the consequences of this unity of existence and interest between the husband and wife is, that at Common Law a married woman cannot, in any case during the continuance of her coverture, institute a suit alone: therefore, whenever it is necessary to apply to a judicial tribunal respecting her rights, the proceeding must be commenced and carried on in their joint names. This rule is invariable in Courts of ordinary jurisdiction, unless when the husband can be considered as civiliter mortuus, in which case the wife is looked upon as restored to her rights and capacity as a feme sole, and may sue alone.

Secus, where

Cannot bring

actions alone.

the husband is civiliter mor-

transported for life;

or attainted and banished by Act of Parliament;

With respect to what is called a civil death in law, Lord Coke says that a deportation for ever into a foreign land, like to a profession, is a civil death, and that in such cases the wife may bring an action, or may be impleaded during the natural life of her husband; and so, if by an Act of Parliament the husband be attainted of treason or felony, and saving his life is banished for ever, this is a civil death, and the wife may sue as a feme sole; but if the husband have judgment to be exiled but for a time, which some call a relegation, this is no civil death (w) (2).

(t) Wartnarby v. Wartnarby, Jac. (u) Co. Lit. 132.

⁽¹⁾ Story Eq. Pl. § 66. (2) Story Eq. Pl. § 61; Wright v. Wright, 2 Desaus. 244; Cornwall v. Hoyt, 7 Conn. 420; Troughton v. Hill, 2 Hayw. 406; Robinson v. Reynolds, 1 Aiken, 174.

Mr. Chancellor Kent, 2 Kent, (5th ed.) 154, in reference to this point, remarks, that "Lord Coke seems to put the capacity of the wife to sue as a feme sole, upon the ground, that the abjuration or banishment of the husband amounted to a civil death. But if the husband be banished for a limited time only, though it be no civil death, the better opinion is, that the consequences as to the wife are the same, and she can sue and be sued as a feme sole." See also Ex parte Franks, 1 Moore & Scott, 1.

In Robinson v. Reynolds, 1 Aiken, 174, this point was considered and the

At Law also, every person who is attainted by ordinary process Effect of Coof high treason, petit treason, or felony, is disabled to bring any action, for he is extra legem positus, and is accounted in law civili- or by ordinary ter mortuus (z); and where the husband is an alien, and has left process; this kingdom, or has never been in this country, the wife may during such absence sue alone (y) (1), although in ordinary cases or alien abroad.

(y) 2 Esp. 554, 587; 1 B. & P. 357; 2 B. & P. 226; 1 N. R. 80; 11 (z) 4 T. R. 361; 2 B. & P. 165; 4 Esp. Rep. 27; 1 Selw. N. P. 6th ed. 628; Cro. Car. 519; 145; Bac Ab. tit. East, 301; 3 Camp. 123; 5 T. R. 679, Bar. & Feme [M.]; 9 East, 472.

English cases ably reviewed; but the question was by this case still left unsettled whether transportation or banishment of the husband by law, for a limited time only, would be sufficient to give the wife the capacity to sue and be sued as a feme sole.

It seems, however, from the case of Foster v. Everard, Craw. & Dix, 135, that a feme covert, whose husband has been transported for a limited term of years, will not be allowed to sue in Equity as a feme sole.

(1) 2 Kent, (5th ed.) 155. Where the husband had never been in the United States, and had deserted his wife in a foreign country, and she came here and maintained herself as a feme sole, she was held entitled to sue and be sued as a feme sole. Gregory v. Paul, 15 Mass. 31, Rand's ed. p. 35, n. (a), and cases cited and cases cited.

So, where the husband, a citizen of and a resident in another of the United States, compelled his wife to leave him without providing any means for her support, and she came into Massachusetts and maintained herself there for mapport, and she came into massachusetts and maintained herself there for more than twenty years as a single woman, she was held entitled to she as a feme sole. Abbot v. Bayley, 6 Pick. 89. The principle of the above decisions has been extended still further by the Rev. Stat. of Massachusetts, ch. 77, § 18. See Story Eq. Pl. § 61, and note to this point; 2 Kent, (5th ed.) 156, 157.

In Beane v. Morgan, 4 M'Cord, 148; S. C. 1 Hill, 8, it was held, that if the husband leave the State, without the intention of returning, the wife is competent to contract, to sue and be sued, as if she were a feme sole. See Valentine v. Ford, 2 Browne, 193; Robinson v. Reynolds, 1 Aik. 174; Troughton v. Hill, 2 Hayw. 406; Rhea v. Rhenner, 1 Peters, 105; Edwards v. Davies, 16 John. 286; Chitty, Cont. (6th Am. ed.) 177, et seq.
In Gregory v. Pierce, 4 Metcalf, 478, it was observed by Chief Justice Shaw,

that "the principle is now to be considered as established in this State, as a necessary exception to the rule of the common Law, placing a married woman under disability to contract or maintain a suit, that where the husband was never within the Commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a feme sole. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm. Gregory v. Paul, 15 Mass. 31; Abbot v. Bailey, 6 Pick. 89. In the latter case, it was held, that in this respect, the residence of the husband in another State of these United States, was equivalent to a residence in any foreign State; he being equally beyond the operation of the laws of the Commonwealth and the jurisdiction of its Courts.

But to accomplish this change in the civil relations of the wife, the de-

sertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and the intent of the husband to renounce de facto, and as far as he can do it, the marital relation, and leave his wife to act as a feme sole. Such is the

verture. followed in Equity.

Effect of Co- the absence of the husband affords no ground for a wife's proceeding separately (z). In these respects Courts of Equity follow the Rules of Law rules of Law. Thus it has been held in Equity, that where a husband has been banished for life by Act of Parliament, the wife may in all things act as a feme sole, as if her husband were dead, and that the necessity of the case requires that she should have such power (a); and where a husband was attainted of felony and pardoned on condition of transportation, and afterwards the wife became entitled to some personal estate as orphan to a freeman of London, such personal estate was decreed to the wife as a feme sole (b).

Wife cannot sue without husband, except under certain circumstances.

Distinction at Law between personal property accrued before and after marriage.

In Equity, however, as well as at Law, the general rule which requires the husband to be joined in a suit respecting the rights of his wife, prevails, except under particular circumstances, which will be hereafter pointed out; but at Law, there exists a distinction between actions for property which has accrued to the wife before marriage, and actions for property which has come to her afterwards, which distinction does not appear to prevail in Equity. For with respect to such debts and other choses in action as belong to the wife and continue unaltered, since the husband cannot disagree to her interest in them, and as he has only a qualified right to possess them, by reducing them into possession during her life; he is unable to maintain an action for such property without making his wife a party (c) (1); but for all personal estate which

(z) 11 East, 301; [2 Kent, (5th ed.)

(b) Newsome v. Bowyer, 3 P. Wms. 37.

Ĭ71, Pl. 1.

(a) Countess of Portland v. Prod-ers, 2 Vern. 104; S. C. Eq. Ca. Ab. 211, and the cases there cited, notis.

renunciation, coupled with a continued absence in a foreign State or country, which is held to operate as an abjuration of the realm."

§ 1, § 4.

A wife who is divorced a mensa et thoro, may sue as a feme sole on causes of action arising after the divorce. Dean v. Richmond, 5 Pick. 461; Pierce v. Burnham, 4 Metcalf, 303. See 2 Kent, (5th ed.) 157.

(1) In Clapp v. Stoughton, 10 Pick. 47, it was remarked by Mr. Justice Wilde, "I think the true rule is, that in all cases where the cause of action survives to the wife, the husband and wife must join, and he cannot sue alone. This rule will go farther than any other to reconcile all the cases. In all ac-This rule will go farther than any other to reconcile all the cases. In all actions for choses in action due to the wife before marriage, the husband and wife must join; and among all the conflicting cases, I apprehend not one

In Massachusetts, it is provided by Statute, that, when any married man shall absent himself from the State, abandoning his wife and not making sufficient provision for her maintenance, if the wife is of the age of twenty-one years, the Supreme Judicial Court may, on her petition, authorise her to commence, prosecute, and defend any suit in law or Equity to final judgment and execution, in like manner as if she were unmarried. Rev. Stat. ch. 77.

accrues to the wife, or to the husband and wife jointly during Joinder of Husband and wife. marriage, and for all covenants made or entered into with them during that period, the husband may, at Law, commence proceedings in his own name; because the right of action having accrued after marriage, the husband may disagree as to his wife's interest and make his own absolute, an intention to do which he manifests in bringing an action in his own name, when it might have been commenced in the name of both of them (d) (1) and in such case, it has been held, that if the husband recover a judgment for a debt due to the wife, and die before execution, his personal representative will be entitled to the benefit of it, and not the wife (e). Does not apply The distinction above pointed out does not, however, as has been stated, appear to exist in Courts of Equity, where it seems necessary that in all cases in which the husband seeks to recover the property of the wife, he should make her a party co-plaintiff with himself, whether the right to the property accrued before or after marriage (2). Thus in Clarke v. Lord Angier (f), where a Wife must in legacy was given to a feme whilst she was covert, and the husband all cases be a without her exhibited a bill for it, to which the defendant demur- for her own red, on the ground that the wife ought to have been joined in the estate. suit, the demurrer was allowed (g) (3); and the Court has even gone the length of granting an injunction to stay proceedings in

earty to a suit

can be found in which it was held, that the husband could sue alone, where the cause of action would clearly survive to the wife." See Morse v. Earl, 13 Wendell, 271.

⁽d) Ibid. 210. (e) Ogłander v. Batson, 1 Vern. 396; Garforth v. Bradley, 2 Ves. 677. (f) 2 Freeman, 160; 1 Cha. Ca. 61; Nels. 78. (g) Vide stiam Blount v. Bestland, 5 Ves. 515.

^{(1) 2} Kent, (5th ed.) 142, 143.
(2) See Cherry v. Belcher, 5 Stew. & Port. 133; Tribble v. Tribble, 5 J.
J. Marsh, 180; Bradley v. Emerson, 7 Vermont, 369.

⁽³⁾ In such case the husband and wife are necessary parties. Schuyler v.

⁽a) In such case the husband and while are necessary parties. Schuller v. Hoyle, 5 John. Ch. 196; Oldham v. Collins, 4 J. J. Marsh, 50; 2 Kent, (5th ed.) 138; Foster v. Hall, 2 J. J. Marsh, 546; Pyle v. Cravens, 4 Litt. 18. In the case of Goddard v. Johnson, 14 Pick. 352, at Law, it was decided, that a husband may sue in his own right, after the death of his wife, for a legacy accruing to the wife during the coverture. In this case the Court said, we We think the husband might have sued alone, had the wife been still living, and consequently that this extent may be sustained. It is a well set. living, and consequently that this action may be sustained. It is a well settled principle, that a chose in action accruing to the husband and wife during coverture, vests absolutely in the husband." In Hapgood v. Houghton, 22 Pick. 480, the Court confirmed the above decision. See Sawyer v. Baldwin, 20 Pick. 378; Davis v. Newton, 6 Metcalf, 543-545.

Joinder of hus- the Ecclesiastical Court, in a suit instituted there by a husband band and wife. alone, to obtain a legacy bequeathed to his wife (h) (1).

Her money not paid out of Court without her consent.

The ground upon which Courts of Equity require the wife to be joined as co-plaintiff with her husband in suits relating to her own property is, the parental care which such Courts exercise over those individuals who are not in a situation to take care of their own rights; and as it is presumed that a father would not marry his daughter without insisting upon some settlement upon her, so those Courts standing in loco parentis, will not suffer a husband to take a wife's portion until he has agreed to make a reasonable provision for her (i) (2), or till it has given the wife an oppor-

(A) Anon. 1 Atk. 491; Meales v. Meales, 5 Ves. 517, note. From what was said by the Master of the Rolls in Carr v. Taylor, 10 Ves. 580, some doubt appears to have existed in his Honor's mind as to the application of the rule which requires a wife to be joined in all suits instituted by her husband for the recovery of her property, to cases where the property sought to be recovered is merely a legal chose in action, accruing to the wife after marriage, and for which the husband might, at Law, maintain a

suit alone, but is obliged to resort to a Court of Equity for the purpose of removing some legal impediments, or of obtaining the benefit of an account. With great deference, however, to so high an authority, it is submitted, that such a distinction does not exist, since the right of a wife to a settle-ment, which is the foundation of the rule, which requires the wife to be joined, applies to all cases where the wife's estate is concerned, whether legal or equitable.

(i) 2 Atk. 420.

It has at length become the settled rule of the Courts of Equity, in New It has at length become the settled rule of the Courts of Equity, in New York, that they will interfere, and restrain a husband from recovering at law hils wife's property, until he makes a provision for her. See Van Epps v. Van Deusen, 4 Paige, 64; Fry v. Fry, 7 Paige, 462; Martin v. Martin, 1 interfere in such case on a hill filed by or on behalf of the wife. Van Epps interfere in such case, on a bill filed by or on behalf of the wife. Van Epps

⁽¹⁾ The subject of the husband's right to a legacy bequeathed to his wife,

⁽¹⁾ The subject or the husband's right to a legacy bequeathed to his wife, or to a distributive share in an estate, in which she is interested, is fully considered, and the authorities collected, in Blount v. Bestland, 5 Summer's Vesey, 515, Perkins's note (a); Carr v. Taylor, 10 ib. 574, Perkins's note (c).

(2) This point is very fully considered in 2 Kent, 5th ed.) 139, et seq. If the husband wants the aid of Chancery to get possession of his wife's property, or if her property be within the reach of the Court, he must do what is equitable her believed to the contraction of the court, he must do what is equitable here. able by making a reasonable provision out of it for the maintenance of her and her children. Whether the suit for the wife's debt, legacy, or portion, be by the husband or by his assignees, the result is the same, and a proper settlement on the wife must first be made of a proportion of the property. Ib: ment on the wife must first be made of a proportion of the property. Ib; Howard v. Moffat, 2 John. Ch. 206; Duvall v. Farmer's Bank Maryland, 4 Gill & John. 282; Whitesides v. Dorris, 7 Dana, 106; Dumond v. Magee, 4 John. Ch. 318; Kenney v. Udall, 5 John. Ch. 464; Haviland v. Bloom, 6 John. Ch. 178; 2 Story Eq. Jur. § 1402, et seq.; Mumford v. Murray, 1 Paige, 620; Fabre v. Colden, 1 Paige, 166; Sawyer v. Baldwin, 20 Pick. 378; Davis v. Newton, 6 Metcalf, 543-545; Tucker v. Andrews, 13 Maine, 124; Glen v. Fisher, 6 John. Ch. 33; Cape v. Adams, 1 Desaus. 567; Heath v. Heath, 2 Hill, Ch. 104; Rees v. Waters, 9 Watts, 90; Myers v. Myers, 1 Bailey Eq. 24; Helm v. Franciscus, 2 Bland, 545; Tevis v. Richardson, 7 Monroe, 660.

tunity of making her election, whether the property shall go to Joinder of husher husband or shall be made the subject of a settlement upon her and her children. Upon this principle it is, that where a sum of money is declared by the decree or order of the Court to belong to a married woman, the Court will not suffer it to be paid over to the husband till the wife has been examined apart from him, to ascertain whether such payment is to be made by her consent, or whether she is willing to have a settlement of the money made upon her and her children (k) (1). It is therefore the constant

(k) Elliot v. Cordell, 5 Mad. 156.

v. Van Deusen, 4 Paige, 64. Or on a petition. Davis v. Newton, 6 Metcalf,

The result of the cases seems to be, that whenever the interests of a married woman are brought before the Court, in opposition to the claims of her husband, they will be attended to, whoever the person applying to the Court may be. Clancy, Rights of Women, (Am. ed.) 474; 2 Story Eq. Jur. § 1414; Van Duzen v. Van Duzen, 6 Paige, 366; Davis v. Newton, 6 Metcalf, 543, 544.

See a discussion of this subject of settlement in such cases, in Parsons v. Parsons, 9 N. Hamp. 309, 320, et seq.; 2 Kent, (5th ed. 141, 142. In some of the States the power of affording such protection to the wife

does not exist. See 2 Kent, (5th ed.) 141, 142; Parsons v. Parsons, 9 N. Hamp. 309, 320, et seq.; Yoke v. Barnet, 1 Binney, 358; Matter of Miller, 1 Ashmead, 323. In Sawyer v. Baldwin, 20 Pick. 387, in reference to securing a provision for the wife in such cases, the Court remark, that the "practice prevails to some extent in New York, but is repudiated in other It would seem to be repugnant to what we deem the legal rights of the husband, and would never be carried so far here as it has been in Eng. land.

But in Davis v. Newton, 6 Metcalf, 543, speaking of the wife's right to a suitable provision in such cases, the Court remark, that it "is an Equity, which Courts will uphold in all cases where the husband, his creditors, or his assignees have occasion to come into Court to obtain possession of the

property, and wherever a Court of Equity can, in any form, exercise jurisdiction over the subject."

Mr. Chancellor Kent, 2 Kent, (5th ed.) 141, 142, remarks, that, "though such a protection cannot be afforded to the wife in Pennsylvania, where there is no Court of Chancery, nor in New Hampshire, where Equity powers, to a specific extent only, are conferred by Statute upon the Supreme Court of common law jurisdiction; yet I presume that it exists in most of the other States where Courts are established with distinct Equity powers, according to the English system, or with legal and equitable powers united, according to the English system, or with legal and equitable powers united, according to the more general prevailing practice in the United States. It exists in Maryland and Tennessee, and in the latter State protection is even afforded in their courts of law. M'Elhattan v. Howell, 4 Haywood, 19; Duvall v. Farmer's Bank of Maryland, 4 Gill & John. 282." So in Maine. Tucker v. Andrews, 13 Maine, 124. For other States see Heath v. Heath, 2 Hill Ch. 104; Myers v. Myers, 1 Bailey Eq. 24; Helm v. Franciscus, 2 Bland, 545; Tevis v. Richardson, 7 Monroe, 660; Durr v. Bowyer, 2 M'Cord, 368; Argenbright v. Campbell, 3 Hen. & Munf. 144.

It exists in North Carolina with some limitations. Bryan v. Bryan, 1 Bad.

& Dev. Eq. 47.

It is a vain attempt, says Mr. Justice Story, to ascertain by general reasoning, the nature or extent of the above doctrine, for it stands upon the practice of the Courts. 2 Story Eq. Jur. § 1407; 2 Kent, (5th ed.) 141.

(1) See 2 Story Eq. Jur. § 1418, and cases cited.

to payment of Money in Court.

Practice as to taking consent. where she is resident in town.

Order for a commission. in the country,

Wife's consent practice of the Court, where the object of the suit or of an interlocutory application is money or stock belonging to a married woman, if the wife be resident in town, for the Judge, to whom the application is made, to take her examination in Court apart from her husband (1) at the time when the order for payment is pronounced (1). If the woman be resident in the country, a commission will be directed to commissioners for the purpose of taking her examination (m), and the order for this commission may be either inserted in the decree, or made the subject of a distinct order upon motion or petition (n). Under such commission the married woman is to be examined by the commissioners, or such number of them as are mentioned in the commission, separate and apart from her husband; and her examination must be taken down in writing and signed by her and the commissioners, who then certify to the Court the execution by them of the commission. Upon this being done, the commission with the certificate and examination, is returned to the Court by the commissioners and in the subsequent application to the Court to have the money paid to the husband agreeably to the wife's consent, the signatures of the commissioners to the certificate and examination, and of the wife to the latter, must be verified by affidavit (o).

Where wife is abroad.

Where the wife is resident abroad, a similar commission to take her consent will be directed to persons resident there (p). Minet v. Hyde (q) the order was, that she should appear before some of the plaintiffs and a magistrate of Breda, to be privately examined as to her consent, such examination to be in writing in the French or German language, and to be signed by her, and attested by notaries-public, whose certificate thereof was also to be in writing either in the French or German language. It was also ordered that such signing and certificate should be verified by the affidavit of some credible witnesses either in the German or French language, before a proper magistrate of Leyden aforesaid; and that the examination, certificate, and affidavit, should

(m) 1 Newl. 383. n) For a precedent, vide Seton, 257; for a return by commissioners to

order, vide ib. 258, and Tasburgh's case, 1 V. & B. 507.

(o) 1 Newl. 384; Tasburgh's case, 1 V. & B. 507.

(p) Parsons v. Dunne, 2 Ves. 60; Bourdillon v. Adair, 3 Bro. 337. (q) 2 Bro. C. C. 663.

⁽l) For a decree to pay to husband on consent of wife given in Court, vide Seton on Decrees, 255. For the order, vide Hand's Practice, 213.

⁽¹⁾ As to examinations of the wife apart from her husband, see cases cited in Spurling v. Rochfort, 8 Sumner's Vesey, 175, Perkins's note (a); Binferd v. Bawden, 1 Sumner's Vesey, 512, and note (s), and cases cited.

be translated into English by certain notaries-public, sworn to the Wife's consent truth of their translation (r). Where, however, the wife is domiton to payment or Money to her ciled abroad, and in a country by the law of which there is no equity of settlement, but the whole is payable to the husband, her Where domiconsent is not necessary (s).

to payment of Husband.

ciled abroad.

It seems that where a wife's consent has been already given Where not reupon her examination before another competent tribunal, she need quired. not be again examined in a Court of Equity; thus, in Campbell v. French (t), Lord Loughborough did not think it necessary to issue a commission to take the examination of a married woman residing in America, as she appeared to have been examined under a commission issued by the government of Virginia, and had consented to a power of attorney to receive the legacy which had been executed by her husband. And so it had been held, that where a married woman is entitled to a share of money arising from the sale or mortgage of an estate which has been mortgaged or sold, and in order to effect such sale or mortgage she has joined in levying a fine of her share, and for that purpose has undergone the usual examination in the Court where such fine has been levied. she will be barred, by the fine, of her equity for a settlement (u).

It may be observed here, that all applications for payment to the Of the affidahusband of money belonging to the wife, with the consent of the vit that there wife. must either be supported by an affidavit that there is no ment. settlement on the marriage (v), or if there has been any settlement or agreement for a settlement made upon the marriage, it must be produced for the purpose of enabling the Court to judge whether it affects the fund in question; and in the case of Rose v. Rolls (z), Lord Langdale, M. R., observed, that many instances had recently occurred, where parties had made affidavits representing that a settlement did not affect the property in question, yet on inspection of the settlement it had turned out to be quite the reverse. It was therefore necessary either to produce the settlement, or to show that none existed. The Court also will not take (v)

is no settle-

⁽r) Ibid. Ed. Belt, p. 662, N. 1, vide ctiam Parsons v. Dunne, Belt's Suppl. to Ves. 276.

⁽s) Campbell v. French, 3 Ves. 321; Dues v. Smith, Jac. 544; Anstruther v. Adair, 2 M. & R. 513.

⁽t) 3 Ves. 321.

⁽u) May v. Roper, 4 Sim. 360. (v) Minet v. Hyde, 2 Bro. C. C. 663; Elliott v. Remmington, 9 Sim.

⁽z) 1 Beav. 270; see Jones v. Smith, 1 Hare, 67; Batt v. Cuthbertson, 3 Dr.

[&]amp; W. 58, as to production of originals

⁽y) Spurling v. Rochfort, 8 Ves. 178; Woollands v. Crowcher, 12 Ves. 178; Jernegan v. Baxter, 6 Mad. 32; but in the case of Packer v. Packer, 3 Y. & C. 92, Sir J. L. Knight Bruce, V. C., ordered payment upon the consent of a married woman administratrix of the residue that should remain of a fund in Court after the payment thereout of costs not at that time taxed.

to payment of Husband.

Wife's consent the consent of the wife till the amount of the fund is ascertain-Money to her ed; nor will it direct the payment where only part is ascertained, if any part remains unascertained (z).

Consent unnecessary if fund under 200l. or 10l. per annum.

Formerly, where the sum exceeded 100%, the consent of the wife could not be dispensed with (a), but now, where the sum is under 2001., or produces less than 101. a-year, consent will be dispensed with (b); and in Foden v. Finney (c), where the wife's money in Court did not amount to 2001., it was ordered to be paid to the husband, though he had deserted her, and she opposed the application. In a case where the wife became of unsound mind. and was supported by her husband, the Court ordered the whole of her income not settled to her separate use amounting to 5001. a-year to be paid to him; but the arrears, and future payments of an annuity of 1001. a-year, settled to her separate use, were ordered to be accumulated for her benefit (d): and where a sum of stock was bequeathed to a married woman, whose husband was of unsound mind, though no commission of lunacy had been issued against him, in consideration of the poverty of the parties, an order was made upon petition, that the dividends, amounting to 201. per annum, should be paid to the wife (e).

Where wife of unsound mind.

Where husband of unsound mind.

Effect of marriage after money reported due to a woman.

By an order of the 16th Feb. 1806 (f), it is directed that where any sum is ordered to be paid, or is reported to be due to an unmarried woman, in case of her marriage before payment, where the sum does not amount to 2001. or to the sum of 101. in annual payments. upon affidavit of the husband and wife stating such marriage, and that no settlement or agreement for a settlement has been made affecting. or relating to such sum, the Accountant-general may make his draft for such money, payable either to the wife or to the husband. But in such a case where the sum in Court amounts to 2001. and upwards, the money cannot be paid out without an application to the Court, which also must be supported by an affidavit from the party that the money has not been the subject of settlement (g). This restriction, however, applies only to applications for the capital, for where the interest only of a fund is ordered to be paid to a single woman who afterwards marries, the Accountant-general may, even where the amount exceeds 101. per annum, continue to make the payments to the husband; but in such case also it is necessary, that besides the usual affidavit of the mar-

⁽z) Godber v. Laurie, 10 Pri. 152. (a) Bourdillon v. Adair, 3 Bro. 237. (b) Elworthy v. Wickstead, 1 J. & **W**` 69.

⁽c) 4 Russ, 428.

⁽d) Nettleship v. Nettleship, 10 Sim. 236.

⁽e) Stead v. Calley, 2 M. & K. 52. (f) Beame's Ord. 464.

⁽g) Hough v. Ryley, 2 Cox, 157.

riage and identity of the party, there should be an affidavit that Wife's consent there was no settlement or agreement for a settlement (h).

The wife, as we have seen, may, upon her examination in Court or before commissioners, waive her right to a settlement alto- If wife congether, and give the property to her husband (1). In Ex parte sent, the fund Higham (i), however, Lord Hardwicke appears to have consid-band. ered himself entitled to object to the whole fund being paid over to the husband, who was in trade, even though the wife consented. But in Willats v. Cay (k), where the wife had appeared in Court, and being examined desired that the whole money might be paid to her husband, the Master of the Rolls, although the parties had married without the consent of the wife's relations, and the husband appeared to be insolvent, refused to refer it to the Master to consider a scheme for securing a provision for the wife, observing, not paid where that it was never done unless circumstances of fraud or of compulsion on the part of the husband appeared; and that a wife fraud, &c. might as well dispose of her personal estate, over which she has an absolute control, as of real estate, which she might do by joining in a fine with her husband (l) (2).

Money to her Husband.

But, although a wife may consent to waive her equity for a set- Her consent tlement out of her immediate personal property, yet where property only taken has been settled to her use for life, and after her death to such per-right to propsons as she should appoint by will, and in default of appointment erty immedito her executors, &c., she cannot, in her lifetime, consent that the property should be given to her husband (m).

The rule of the Court appears to be, that the wife can only consent to depart with that interest which is the creature of a Court of Equity; viz. the right which she has in a Court of Equity to claim a provision by way of settlement on herself and children, out of the property which at Law the husband could take possession of in her right. This equity arises upon the husband's legal and not where right to present possession; and the principle has no application a remainder or reversion. to a remainder or reversion, which can only be passed to the husband when it falls into possession: with respect to an interest of

⁽h) Clayton v. Gresham, 10 Ves. 289.

(i) 2 Ves. 579.
(k) 2 Atk. 67.
(l) Vide acc. Milner v. Colmer, 2 Bro. 195; Ellis v. Atkinson, ib. 565; P. Wms. 642; Lanoy v. Athol, 2 Atk. 448; Oldham v. Hughes, 2 Atk. 452;

(m) Socket v. Wray, 2 Atk. 6, n.

^{(1) 2} Story Eq. Jur. § 1418, and note; Murry v. Lord Elibank, 10 Sumner's Vesey, 84, and note (f).

⁽²⁾ See Sawyer v. Baldwin, 20 Pick. 378.

to payment of Husband.

Wife's consent this description, it has been stated generally, that the Court will Money to her not allow her by any act of hers during coverture to bind her future rights. Without her consent the Court will not deal with it or dispose of it at all; and her consent the Court will refuse to take (n) (1). Thus a petition, which had for its object the payment to the husband of a sum of money to which the wife was entitled in reversion after the death of her mother, was refused (o).

In Howard v. Damiani (p), however, a different order appears to have been made by Sir William Grant, M. R.; but that was a mere order made by consent, and according to the opinion of Lord Lyndhurst in Honor v. Morton (q), not to be relied upon. In Macarmick v. Buller (r), however, Lord Kenyon, M. R., made an order, upon the consent of a married woman given in Court, for the payment of trust money to her husband, which appears to be completely at variance with the rule laid down in the cases just cited. In that case, on the marriage of the plaintiff, a sum of 9,0001. had been vested in trustees upon trust to pay the interest to the husband for life, and after his death to the wife for life, and upon the death of the survivor to pay the principal to such persons as such survivor should direct; but the husband having occasion for the money, joined with the wife in executing a deedpoll, whereby they appointed the money immediately to the husband, and upon personal examination of the wife in Court, the trustees were directed to pay the money to the husband, and to deliver up the settlement to be cancelled. In a recent case, where a feme covert was tenant in tail in remainder after a subsisting life estate of money to be laid out in land, it was held by Sir J. Leach, M. R, that she could by an arrangement with the tenant for life, and on a private examination under the 7 Geo. IV. c. 45, consent to the payment of a portion of the money to the husband (s). But that Act, it is to be remarked, gives to the tenant in tail in remainder an immediate right to apply, in concurrence with the tenant for life, for the payment of the money out of Court, so that the order so made under the Act is not at variance with

When it consists of a remainder, and there is a power of appointment in the survivor.

Where under tenant in tail, Act 7 Geo. IV c. 45.

(n) Lord Cottenham in Frank v.

Woollands v. Crowcher, 12 Ves. 175; ib. 458, n.; and post, on Wife's right by Survivorship.
(p) 2 Jac. & W. 258, n.
(q) 3 Russell, 63.
(r) 1 Cox, 357.

(s) In re Silcock's Est. 3 Russ.

Frank, 3 M. & C. 178.

(o) Pickard v. Roberts, 3 Mad.
384; see Stiffe v. Everitt, 1 M. & C.
37; Richards v. Chambers, 10 Ves.
580, [Sumner's ed. note (b);] Ritchie
v. Broadbent, 2 Jac. & W. 456;

⁽¹⁾ Woollands v. Crowcher, 12 Sumner's Vesey, 174, Perkins's note (s), and cases cited; 2 Story Eq. Jur. § 1413, and notes and cases cited.

the rule above noticed, that the wife can only consent to depart Wife's consent with that which the husband, in her right, has an immediate right Money to her to reduce into possession.

Husband.

Where property is settled to the separate use of a married wo-Her examinaman, her examination in Court is not necessary in order to pass tion in Court her interest to a purchaser. The principle upon which this rule is dispensed founded is that she is, as to that property, a feme sole, and as such she has separhas a disposing power over it; and it applies as much to reversion- ate estate. ary property as to property in possession (t) (1). Upon the same principle, where a married woman to whom an annuity was bequeathed for her separate use joined with her husband in assigning part of it for a valuable consideration, and she, the husband, and the purchaser, afterwards filed a bill against the executors of the testator under whom the annuity is claimed, a doubt having occurred whether in such a case a decree could be taken by consent, the Master of the Rolls was of opinion, that it could, and directed the decree to be drawn up accordingly (u).

But although where property has been settled to the separate use In transactions of a married woman, the Court will give effect to her alienation of with her hussuch property, in the same manner that it gives effect to an aliena- separate estate tion by a feme sole, the rule does not extend to transactions with concerned. her husband, which are looked upon by the Court with considerable jealousy, so much so, that it is very constantly the course where the trustees have obliged the party to come to the Court, not to establish a deed between the husband and wife disposing of the separate estate of the wife, without the actual presence of the wife (x).

It has not, however, been determined that a wife may not, in any case, dispose of her separate property to her husband, unless by consent in Court. Several instances have occurred where wives, by acts in pais, have parted with separate property to their husbands (y). It should be observed, however, that such gifts are never to be inferred without very clear evidence (z) (2).

a. n. (y) Pawlet v. Deleval, 2 Ves. 669.

⁽t) Sturgis v. Corp, 13 Ves. 190; [Sumner's ed. note (a).]

[Sumner's ed. note (a).]

(u) Stinson v. Ashley, 5 Russ. 4.

(z) Gullan v. Trimbey, 2 Jac. &

W. 457, n.

⁽z) Rich v. Cockell, 9 Ves. 369; [Sumner's ed. Perkins's note (e);] Harvey v. Ashley, cited 2 Ves. 671; S. C. 3 Atk. 607; Harg. Co. Lit. 37

⁽¹⁾ See Spurling v. Rochfort, 8 Sumner's Vesey, 175, Perkins's note (a), and cases cited; 2 Story Eq. Jur. § 1413, and notes.

⁽²⁾ A wife may be stow her separate property upon her husband, by appointment or otherwise, as well as upon a stranger. 2 Story Eq. Jur. § 1395, 1396; Methodist Epis. Church v. Jaques, 3 John. Ch. 86-114; Bradish v. Gibbs, 3 John. Ch. 523.

Wife's consent to payment of Husband.

Where under age cannot be taken.

It is also to be observed, that if the wife be not of full age, she Money to her is incapable of giving her consent; in that case, therefore the Court will not examine the wife, but will require the husband, in case he applies to this Court for her equitable property, to make a proper settlement upon her (a). The Court, however, possesses no means of compelling a husband to make a settlement upon his wife out of her property in Court, if he does not seek to lay his hand upon the capital, unless in the case of his having committed a contempt by marrying a ward of Court (b).

According to the practice of the Court, affidavits cannot be received upon the hearing of a cause for further directions (c).— One result of this rule is, that an order for payment out of Court, of money the property of a married woman, cannot generally be Must be taken obtained by decree at the hearing; but a petition for that purpose must be presented, which may come on to be heard, either together with the cause on further directions, or with more propriety. may be presented after the decree has been made, and the fund thereby carried over to the account of the husband and wife.

Where she refuses to give her consent.

upon petition.

If a married woman, upon being examined apart from her husband, refuses to give her consent to the money being paid to her husband, the consequence of such refusal is a reference to one of the Masters of the Court to approve of a proper settlement to be made upon her and her children; unless the facts are so completely before the Court as to induce it to make the order at once without sending the matter to the Master (c) (1).

Distinct from her right by survivorship.

The right of a married woman to have a settlement made upon herself and her children out of her personal property, which is the subject of a suit in Equity, is totally distinct from her right by survivorship to such of her choses in action as have not been reduced into possession during the joint lives of herself and husband. right by survivorship is a legal right, applying equally to her legal and equitable interest; but her right to a settlement depends upon the peculiar rule of Courts of Equity before alluded to, which, standing in loco parentis with regard to a feme covert, will not suffer the husband to take the wife's portion until he has agreed to make a reasonable provision for her and her children, unless they are satisfied that it is with her free consent that it is paid over to

⁽b) Ball v. Coutts, 1 V. & B. 300. (a) Stubbs v. Sargon, 2 Beav. 496; Abraham v. Newcombe, 12 Sim. 566, (c) Nicholson v. Haines, 1 Coll. overruling Gullin v. Gullin, 7 Sim. 196. **236**.

⁽¹⁾ See Davis v. Newton, 6 Metcalf, 544, cited post, 130.

This rule of Equity is not of modern adoption, but has Wife's right to been recognized and acted upon from a very early period. In the case of Tanfield v. Devonport (e), which occurred in the 14 Chas. Not of modern I., Lord Keeper Coventry takes motice of it, and it has been adoption. acknowledged and followed in all subsequent cases, where a wife has had a demand in her own right, and application has been made to a Court of Equity to enforce it (f). Where, however, the demand is not one which accrues to the husband in right of his wife, altough he may be entitled to it under a contract made upon his marriage, yet if he alone has the right to sue for it, the equity of the wife to a settlement will not attach. Thus where, in contem- Will not attach plation of marriage, the father of the intended wife covenanted to where husband is a purchaser pay 1000% to the husband on marriage, and also that his heirs, ex- of her estate ecutors, &c., should, within six months after his death, pay the by settlement. further sum of 500l, to the husband as the remainder of the wife's portion, it was held that the wife was not entitled to a settlement out of the 500L, as it never was her money, and was only a debt due the husband from the father (g).

a Settlement

It is to be remarked, that although the Court will in general In cases where oblige the husband to make a settlement upon his wife and children pending. of any property which he may be entitled to in right of his wife, for the recovery of which it is necessary to resort to a Court of Equity, yet where there is no suit pending, the husband is authorised to lay hold of his wife's property wherever he can find it (h) (1). Thus there is no doubt that previously to a bill, a trustee who is in possession of the wife's property, real or personal, may pay the rents of the real estate to the husband, or may hand over to him the personal estate (k), and the Court will not, upon bill filed, recall it (1) (2). Where, however, a bill has already been After bill filed, filed, a trustee cannot exercise his discretion upon this point, as trustee cannot pay over her

money.

(c) Coster v. Coster, 9 Sim. 604; rison v. Buckle, 1 Stra. 239; Winch Napier v. Napier, 1 Dr. & W. 407.

(d) Jewson v. Moulson, 2 Atk. Marlow, 2 Atk. 520. (d) Jewson v. Moulson, 2 Atk. 419.

(c) Tothill, 114.
(f Jewson v. Moulson, ubi supra;
Milner v. Colmer, 2 P. Wms. 641;
Adams v. Pierce, 3 P. Wms. 11;
Brown v. Elton, 2 P. Wms. 202; Har-

(g) Brett v. Forcer, 3 Atk. 403. (h) Jewson v. Moulson, 2 Atk. 419. (k) Murray v. Lord Elibank, 10 Ves. 90.

(l) Glaister v. Kewer, 8 Ves. 206.

^{(1) 2} Kent, (5th ed.) 141; Howard v. Moffat, 2 John. Ch. 206; Thomas v. Sheppard, 2 M'Cord, ch. 36; Matter of Hume Walker, 1 Lloyd & G. 159, cases Temp. Plunket; 2 Story Eq. Jur. § 1403, and notes. See Van Epps v. Van. Deusen, 4 Paige, 64; Fry v. Fry, 7 Paige, 462.
(2) 2 Story Eq. Jur. § 1410.

a settlement.

Husband entiof wife's property, as long as he maintains her.

even though he will not make a settlement.

If husband misconduct himself.

Wife's right to the bill makes the Court the trustee, and takes away from the actual trustee his right of dealing with the property, without its sanc-This doctrine was laid down by Lord Alvanley in Macauley v. Philips (m), and has since been recognized with approbation by Lord Eldon, in Murray v. Elibank (n). But, though a trustee cannot, after a suit, pay over the rents and profits or the interest tled to interest of the wife's property to the husband without the direction of the Court, yet the Court will not in general deprive the husband of the benefit of them during his life (o), but will permit him, in consideration of his maintaining her, to enjoy them without requiring her consent, or making any provision for her out of it (p). right will not, it seems, be forfeited by his declining to make a settlement upon her; and accordingly, in Sleech v. Thorington (q), the Master of the Rolls said that the Court did not think itself empowered to take away from the husband his wife's fortune so long as he was willing to live with and maintain her; and that where a husband would not go in before the Master, even in that case the Court would not proceed so far as to take away the produce from him and prevent his receiving the interest; but that it constantly, where the husband maintained the wife, accompanied the direction for a suspension with an order for payment of the interest to the husband. If, however, the husband misconduct himself, as in the instance of receiving a considerable part of his wife's portion so as to leave but a small part remaining, and then refusing to make an adequate settlement upon her, in such case, as Lord Hardwicke said, in Bond v. Simmons (r), the Court will not merely stop the payment of the residue of her portion to her husband, but will prevent him from receiving the interest of that residue, in order that it may accumulate for the wife's benefit (1).

In that case the Court had referred it to the Master to receive proposals from the husband for a settlement, and the Master had certified that no proposals had been made in consequence of which the dividends of the wife's portion were suffered to remain in the hands of the Accountant-general until the death of the husband; and upon a dispute arising whether these dividends belong to the

⁽m) 4 Ves. 15; Sumner's ed. note (p) Allerton v. Knowel, cited 4 Ves. 799.

⁽n) 10 Ves. 90. (q) 2 Ves. 561. (o) Bond v. Simmons, 3 Atk. 20.

⁽r) 3 Atk. 20.

^{(1) 2} Story Eq. Jur. § 1415, § 1422–1424, § 1426.

wife or to the representatives of the husband, Lord Hardwicke Wife's right to held that they belonged to the wife by survivorship (s).

a Settlement.

The principle upon which Courts of Equity give to the husband If husband dethe interest of his wife's estate, being, as we have seen, to enable desert her; or oblige her by him to maintain her and the children of the marriage, it follows cruelty to as one of the consequences of this principle, that if he desert his leave him, she is permitted to wife, or treat her with cruelty so as to oblige her to separate from receive the inhim, the Court will allow her to receive the interest of her own terest of her fortune for her maintenance (t) (1).

Thus in Watkyns v. Watkyns (u), where there was strong substantial evidence of the wife having been cruelly and barbarously used by her husband, who had quitted the kingdom after having possessed himself of the greatest part of her fortune, Lord Hardwicke, after directing it to be ascertained how much of her property remained in specie, ordered it to be placed out at interest, and such interest to be paid to the wife until her husband returned and maintained her as he ought to do; and so in Wright v. Morley (z), where the husband went abroad and left his wife unprovided for, she being entitled to the interest of 4000% five per cents. for life, part of the dividends of which he had previously, with her concurrence, assigned to secure the payment of an annuity which he had granted for a valuable consideration, the Court ordered the remainder of the dividends to be paid to the wife for her separate use during the absence of her husband.

Upon the same principle, in Oxenden v. Oxenden (y), where, even when his by articles made previously to the marriage, the wife's property for life by artiwas agreed to be laid out in land, which was to be settled to the use of the husband for life, with remainder to the wife to increase her jointure, with remainder to the younger children; upon a bill being filed by the wife for the execution of the articles, and the husband's ill treatment of her having been duly proved, the Court ordered the money to be laid out, with her consent, in a purchase, and settled pursuant to the articles, but directed the interest, in the mean time, to be paid to her so long as she lived separate, al-

⁽t) Ibid.; 2 Vern. 493; Prec. Ch. 239; and see Coster v. Coster, 9 Sim.

⁽u) 2 Atk. 96; to the same effect

⁽s) Bond v. Simmons, 3 Atk. 20. Sleech v. Thorington, 2 Ves. 562; Atherton v. Nowell, 1 Cox's Rep. 229.

⁽x) 11 Ves. 12, 23. (y) 2 Vern. 493; Lord Rockingsee Williams v. Callow, 2 Vern. 752, ham v. Oxendon, Prec. Ch. 239, S. C.

^{(1) 2} Story Eq. Jur. § 1422-1424, § 1425, § 1426.

Wife's right to though it was provided by the articles that till the purchase the interest should be paid to the husband.

Where a set-

It is to be observed, that in the above case the order was thement has not founded upon the circumstance of the trust not having been executed, and the consequent necessity the parties were under, of coming to the Court to have the execution of the articles decreed. Had the purchase been actually made and settled according to the articles, the Court could not have interfered to take away from the husband the legal right which he would thereby have acquired to the enjoyment of the property as tenant for life under a settlement.

her property, not defeated by contrivance of husband;

The Court, however, will not permit the equity of the wife, to tenance out of maintenance out of her own fortune, to be defeated by any trick or contrivance for that purpose on the part of her husband. If, therefore, as in Colmer v. Colmer (z), he, with an intention to desert her (which he afterwards carries into effect), make a fraudulent conveyance of his and her property upon trust to pay his own debts, the transaction will not prejudice her right to maintenance, but the Court will follow her property into the hands of the trustees, and order her an allowance suitable to her fortune and the circumstances of her husband, although it may be necessary, in order to effect that purpose, to resort to part of his own property so vested in trust.

or where she has been induced to marry by false repre sentations of her husband's property.

In Atherton v. Nowell (a), it appeared that the husband had induced his wife to marry him upon the false representation of his being a person of fortune, when, in fact, he was greatly indebted, and was shortly after the marriage sent to prison, where she resided with him and endured some hardships, which were the consequences of her marriage; and it also appeared that the husband, after liberation from his first confinement, was again sent to prison for another debt, and remained there; that there was one child of the marriage living, to support whom and herself the wife was put to great difficulties; that her husband had refused to contribute to their support, requiring her to live with him in prison, or to be at his mercy for such occasional support as he might think proper to bestow; and that from his behavior to her, as well as on account of her own health, she was afraid again to live with him in prison; - Under these special circumstances the Court ordered, upon cross petitions presented by the husband and wife (the former praying that the interest of the wife's fortune might be paid to him, and the latter for an allowance for maintenance),

when obliged by husband's conduct to separate from him.

(a) 1 Roper, H. & W. 284; 1 Cox,

that 501. cash in the Bank might be paid to the wife for her sep- Wife's right to arate use; and directed the Master to inquire into the circumstances and situation of the families of the husband and wife, with a view to the settlement of her fortune, &c.

It is to be observed that the Court will, as has been shown, not only appropriate the interest of a wife's equitable property for her support in cases where she has been deserted by her husband, or obliged to leave him in consequence of his improper conduct towards her; but it will, under similar circumstances, if a stranger has advanced to the wife money for her maintenance, order it to be repaid to him out of her estate. Thus, in Guy v. Pearkes (b), Court will orwhere it appeared that the wife was unprovided for; that her husto be repaid band, after having gone to sea and deserted her, had subsequently who advances to his return neither cohabited with her, nor afforded her any sup-money to a port, but had since gone to the East Indies and had not been again maintenance. heard of; and that it was unknown whether he were living or dead; and it also appeared that A. had made advances to her of 301. a year during the above period, which were her only support: upon application being made to the Court, that so much of the wife's stock standing in the Accountant-general's name as would raise 2101. might be sold, and the proceeds paid to A. in satisfaction of his debt; also, that a further sum of 501. might be paid to the wife, and that the dividends upon the remaining fund might in future be paid to her for her support, the application was granted, A. having made an affidavit that he was induced to make the advances upon the faith of being repaid them out of the above prop-In pronouncing his judgment, Lord Eldon thus expressed himself; "I have a strong impression upon my mind that this has been done, and, independently of precedent, I think the Court may do it, as the husband deserting his wife leaves her credit for necessaries, and would be liable to an action; and although execution could not be had against the stock, the effect might be obtained circuitously, as he could not relieve himself except by giving his consent to the application of this fund."

If a husband be willing, and offer to maintain his wife, and she, Not entitled to without sufficient reason, refuse to reside with him, upon his ap-maintenance if plication for the interest of her fortune, the Court will order pay- she leaves her husband withment of it to him, even though he decline to make a settlement out cause. upon her (1). Accordingly, in Bullock v. Menzies (c), where A.

⁽b) 18 Ves. 196.

⁽c) 4 Ves. 798; see also Eedes v. Eedes, 11 Sim. 569.

⁽¹⁾ See Fry v. Fry, 7 Paige, 462; Martin v. Martin, 1 Hoff. Ch. R. 462; 2 Kent, (5th ed.) 139, 140, note; 2 Story Eq. Jur. § 1426, and notes.

Wife's right to the wife of B. being entitled for life to the interest of a considerable sum of money, obtained an order for payment of a yearly sum out of such interest for her maintenance, on the ground that her husband, who was an officer, was abroad with his regiment: the husband afterwards returned to England, and petitioned that the allowance should be paid to him and her jointly, stating that, although he was willing to receive his wife, she refused to live with him; upon which, though the petition was resisted by the wife, the order obtained by her was discharged. Upon the husband afterwards going abroad, the wife presented another petition for payment of the same allowance, which was dismissed, because the husband was desirous to support her and himself with the fund, and was only prevented from so doing by her refusal to live with In the above case, it is to be remarked, that no misconduct whatever was imputed to the husband; he had not used his wife cruelly, nor deserted her, except so far as he was obliged to leave her for the sake of serving his country. He had a right, therefore, to the society of his wife upon his return to England, as also to all those benefits which the law gives to a husband in the property of his wife. The wife, consequently, had no reasonable ground for refusing to cohabit with her husband; and failed in making out a case for the interference of a Court of Equity with the legal rights of her husband.

Where she has been guilty of misconduct.

As to the effect of the wife's misconduct upon her equity for a maintenance, it is a trite observation, that persons appealing to a Court of Justice ought to enter it with clean hands; i. e. they must be worthy and proper to receive the redress which they seek: hence it follows, that if the wife has been guilty of gross misconduct, a Court of Equity will not consider her to be entitled to protection. If, therefore, she has committed adultery, or has eloped from her husband without a sufficient reason, the Court will remain passive, and not interfere at her suit to allow her a maintenance out of her equitable property (c) (1).

Right to maintenance attaches when husband becomes bankrupt or insolvent.

Another consequence of the principle upon which the Court gives the interest of the wife's equitable property to the husband, namely, to assist him in her maintenance, is, that if the husband is deprived either by his own act or by that of the law, of the means of contributing to her support, the Court will take care that a

((c) 1 Rop. H. & W. 283; Ball v. v. Campbell, 12 Sim. 616. Montgomery, 2 Ves. J. 191; Duncan

⁽¹⁾ Cave v. Estabrooke, 4 Sumner's Vesey, 146, note (a); 2 Story Eq. Jur. § 1419, § 1426.

a Settlement.

suitable maintenance is given to the wife out of the proceeds and Wife's right to profits of her own property; therefore, "if the husband becomes bankrupt, or takes the benefit of an Insolvent Debtors' Act, this Court will fasten the obligation of maintaining the wife out of her property on the general assignee; for when the title of such assignee vests, the incapacity of the husband to maintain his wife has already raised this equity for her" (d). It is to be observed, however, that the right of the wife to such maintenance will attach only from the time of the bankruptcy; and so likewise where a wife is entitled to an annuity to her separate use, and permits it to be paid to her husband, who becomes bankrupt, she will have no claim for the arrears accrued previous to the bankruptcy (e).

The rule that a wife is entitled to maintenance out of her own property, as against the assignees of her husband, does not necessarily apply to a particular assignee for a valuable consideration, who purchases the life interest of a wife during the time the husband is maintaining her, and before circumstances have raised any present equity in the property for the wife (f).

Thus, in Elliott v. Cordell, above referred to, where the dividends As against a of 9,000% three per cents. were given to a married woman during purchaser of her life interest her life, with a bequest over of the capital after her decease, and the during the husband and wife joined in a conveyance of their life interest to a time the huspurchaser, after which the husband became bankrupt, upon a bill her. filed by the wife against the purchaser, insisting on a provision, it was held by Sir J. Leach, V. C., that though the Court could, had there been no previous assignment, have compelled a provision for the wife as against the assignees under the bankruptcy, yet the purchaser was not obliged to make such a provision, on the ground that when his title vested, the husband was maintaining his wife, and no circumstance had raised any present equity for her. The principle here laid down has since been followed and acted upon by Lord Brougham, in Stanton v. Hall (g).

In the preceding case of Stanton v. Hall, the annuity in question was only to continue during the life of the husband, so that the wife had no interest in it by right of survivorship; and in the case of Elliott v. Cordell, the husband was in fact alive at the time of the decree being made, so that the case only decided that, during the life of the husband, the wife had no equity to demand a settlement against the particular assignee; but neither of the above cases went the length of determining that an assignment made

⁽d) Elliott v. Cordell, 5 Mad. 156.

⁽f) Carter v. Anderson, 3 Sim. 370. (g) 2 Russ. & M. 175.

⁽e) Carter v. Anderson, 3 Sim. 370.

a Settlement.

Wife's right to during the coverture of a life interest belonging to the wife could affect her claim to such dividends or annual produce as might accrue to her after the death of her husband. In the case of Stiffe v. Everitt (h). Lord Cottingham had occasion to consider the question concerning the power of the husband to dispose of his wife's life interest in a fund in Court, which was not settled to her separate use; and he refused to make an order upon a petition, on the ground that the husband could not make a title to such of the dividends of the fund as should accrue after his own death, and during the life of his wife surviving him.

Where previous failure to maintain on part of husband.

It is to be observed, that in the case of Elliott v. Cordell, as well as in that of Stanton v. Hall, there had been no failure on the part of the husband to maintain his wife prior to the assignment. Where there has been a previous failure, by the bankruptcy of the husband, and the wife's life interest is subsequently conveyed by the general assignees to a particular assignee, such particular assignee must take it, subject to the same equity in the wife as that to which it was liable in the hands of the general assignees.

Not defeated of capital,

unless proper-

ty assignable at Law.

But if husband or assignee have no legal title and must come to Equity, Court will impose terms.

It is also to be observed, that in the above cases the subjectby assignment matter was a mere life interest. Where, however, a capital sum is at stake, a different rule prevails; in such cases, the equity of the wife to a settlement out of her own fortune, is not defeated by the assignment of the husband, unless the property be such as is assignable at Law, in which case it is conceived that persons claiming the wife's property, will be entitled to hold it exempt from any right in the wife to a settlement, there being no equity to entitle the Court to interfere upon the ground of favor due to the wife from any person claiming by legal title from the husband (i). But if the husband or his assignee have no title at Law to recover the wife's property, as where it is an equitable interest, in such cases, as he is obliged to apply to a Court of Equity for the recovery of it, the Court will impose the same conditions upon the assignee as it would have required from the husband (1). Upon

(h) 1 M. & C. 37.

(i) Oswell v. Probert, 2 Ves. J. 682.

⁽¹⁾ In Davis v. Newton, 6 Metcalf, 537, the Court held, that while an assignee of an insolvent debtor, under the Statute of Massachusetts, 1638, ch. 163, is proceeding to reduce the choses in action of the debtor's wife to possession, or after he has obtained payment thereof, and before distribution of session, or after he has obtained payment thereof, and before distribution of a the debtor's estate, the wife may apply to the Court, by bill or petition, for a suitable provision to be made for her, out of the proceeds of such choses in action, and the Court will make such provision according to the circumstances of the case. See also to the same point Mitford v. Mitford, 9 Sumner's Vesey, 87, Perkins's notes; Pryor v. Hill, 4 Bro. C. C. (Perkins's ed.) 143,

this principle it is held, in the case of the assignees of a bankrupt Wife's right to husband, or of general assignees for the benefit of creditors, that the assignees cannot be in a better situation than the bankrupt himself (k) (1), and that they must make a provision for the wife out of such part of her property as cannot be come at unless by suit in Equity (1).

The question, whether, in the case of a particular assignee When husband assigns to parclaiming by purchase from the husband for a valuable considera-ticular astion, the Court would or would not impose upon him the condition signee. of making a settlement, has been long disputed; the result, however, seems to be, that such an assignee is bound to make a provision out of the fund for the wife and her children, but that, subject to such provision, he will be entitled to the equitable property discharged from the wife's title by survivorship (2). This point as to a settlement appears to have been decided by Lord Northington, in the case of the Earl of Salisbury v. Newton (m), in the year 1759. There the wife being entitled to 2,000l. as a portion under her father's marriage settlement, or to a legacy of 6,000l. under his will in lieu of it, her husband, who was indebted by bond to the Earl, assigned to a trustee to the Earl, all that he was entitled to in right of his wife for payment of the bond debt, and died, having made no provision for his wife and children. bill was filed by the Earl against her trustee, for an assignment, and Lord Northington gave the usual directions as to the assignee making a settlement upon the wife and her children, observing that the assignee could not be in a better situation than the husband under whom he claimed, and who must have made the settlement if the application had been made to him instead of the assignee. Notwithstanding this decision, the question was con-

(k) Gayer v. Wilkinson, 1 Bro. C. C. 50, n.; Pryor v. Hill, 4 Bro. C. (l) Burden v. Dean, 2 Ves. J. 607; Oswell v. Probert, 2 Ves. J. 682. (m) 1 Eden's Rep. 370.

note (a); Van Epps v. Van Deusen, 4 Paige, 64; Smith v. Kane, 2 Paige, 303; Steinmetz v. Halthen, 1 Glyn & Jam. 64; Kenney v. Udall, 5 John. Ch. 464; S. C. 3 Cowen, 590; Elliot v. Waring, 5 Monroe, 341; 2 Story Eq. Jur. § 1411; Saddington v. Kinsman, 1 Bro. C. C. (Perkins's ed.) 44, and notes; 2 Kent, (5th ed.) 138-143; Perryclear v. Jacobs, 9 Watts, 509; Mumford v. Murray, 1 Paige, 620; Fry v. Fry, 7 Paige, 462; Martin v. Martin, 1 Hoff. Ch. R. 462; Burden v. Dean, 2 Summer's Vesey, 607, note (a); Lumb v. Milnes, 5 Summer's Vesey, 517, note (b), and cases cited. Descip tun, 1 Hoff. Ch. R. 402; Buruer v. Dean, z Summer s vescy, tota, and (a), Lumb v. Milnes, 5 Summer's Vescy, 517, note (b), and cases detect; Dearin v. Fitzpatrick, 1 Meigs, 551; Udall v. Kenney, 3 Cowen, 590.

(1) Mitchell v. Winslow, 2 Story C. C. 630; Winsor v. M'Clellan, ib. 493; Mitford v. Mitford, 9 Summer's Vescy, 87, and note (c).

⁽²⁾ It is now firmly established, that a particular assignee is bound to make such provision. Mitford v. Mitford, 9 Sumner's Vesey, 87, Perkins's note (d), and cases cited; 2 Story Eq. Jur. § 1412; Udall v. Kenney, 3 Cowen, 590.

a Settlement. assigns to particular assignees.

Wife's right to sidered unsettled in Worrall r. Marlar, and Bushman v. Pell, in the year 1764 (n), when Lord Thurlow inclined to the opinion When husband that the wife's equity would not prevail against the assignee of the husband for a valuable consideration; but that opinion, besides being opposed by the above decision of Lord Northington, is at variance with another by the same judge in the year 1765. In that case (o), the husband and his wife assigned her interest in a legacy, to secure to A. 3001. which A. became liable to pay, in consequence of his being surety for the husband in a bond for that sum; upon the bill of A., against the husband and wife, and the assignees, under a commission of bankruptcy which had issued against the husband, for payment of his debt out of the wife's share in her legacy, it was so decreed, subject to the settlement of a part upon the wife and children. In addition to these early decisions, and in opposition to the doubts of Lord Thurlow, there are the opinions of other great Judges in favor of the wife's equity, which are founded upon the principles before laid down. In Jewson v. Moulson (p), Lord Hardwicke refused to order payment to the husband's assignees for valuable consideration, of personal estate to which the wife was entitled under her father's will, and recommended them to agree to a settlement of part of the money upon the wife and her children, (which was assented to, and done accordingly,) his Lordship observing, "that he laid great weight upon the assignment comprehending the whole of the wife's portion; and that if he allowed that practice to prevail, it would trip up all the care and caution of the Court; for a husband, then, would have nothing to do but to take up money of a third person, and although neither he nor the lender knew exactly at the time what the fortune was, yet he might assign it over, and so defeat the care of the Court entirely." In Like v. Beresford (q). Pryor v. Hill (r), and Macaulay v. Philips (s), the Court gave opinions agreeably to those of Lords Hardwicke and Northington. In the last of those cases, Lord Alvanley expressed a very decided opinion upon this subject to the following effect. "Many cases upon this point have been before me, which have put me under the necessity of considering the rights of the wife; and I am clearly of opinion, the doubt respecting the assignment of the husband for a valuable consideration of the wife's equitable interest, was not well founded, with the single exception of a trust of a

 ⁽n) See note to 1 P. Will. 459.
 (o) Wenman v. Mason, in a note;
 1 P. Will. 549, Ed. 5.

⁽p) 2 Atk. 417.

⁽q) 3 Ves. 511.

⁽r) 4 Brown C. C. 139. (s) 4 Ves. 19.

term of years of land, upon which, perhaps there may be some Wife's right to doubt, but subject to that, I am clearly of opinion, an assignment for a valuable consideration will not bar the equity of the wife." In Franco v. Franco (t), his Honor adhered to his opinion, and appears to have been prepared to decide according to it, if the cause in its then stage would have permitted; and in Johnson v. Johnson (u), Sir William Grant, M. R. said, that although it had been decided that an assignment, for a valuable consideration by the husband of his wife's property, was sufficient to bar the right of the wife surviving, it did not take away her equity. Her right not to have it parted with without a settlement being made, still remained clear and untouched.

It is to be observed, that the Court has never required the hus- Does not exband, or the persons claiming under him, to settle the whole of tend to the the wife's choses in action upon her and children, but a reasonable proportion of them only (1). This point was maturely considered by Sir T. Plumer, V. C., in the case of Beresford v. Hobson (x), where, after a revision of all the authorities, his Honor came to the above conclusion. In that case, upon a reference to the Master to receive proposals for a settlement upon the wife of a bankrupt, he reported that he had allowed the whole of the fund, which was a legacy, to be settled upon her, because she had been deserted by her husband, and left by him without the means of support. Upon exceptions to the report, Sir Thomas Plumer allowed them, and directed the Master to review his decision, observing, that "the question is not whether the assignees of a bankrupt are subject to this equity, but to what extent it is to be carried as against them. I have looked into all the authorities; in no case has the whole of the property been settled on the wife and children.

⁽z) 1 Mad. 363.

⁽t) 4 Ves. 530. (u) 1 Jac. & W. 472.

⁽¹⁾ The amount of such provision must depend upon circumstances, amongst which, the amount of the property, the age, health and condition of the wife, the number, age, sex and health of her children, if any, would be fit subjects of consideration. In this respect, in a case directly before the Court, it would be proper for the Court to avail itself of the aid of a Master, to inquire into and report the circumstances, and to report what would be a suitable provision for the wife. Cases may be supposed, in which, if the property were small, and had been kept entirely distinct from that of the husband, and where the exigencies of the family were such as to require it, it would be proper to appropriate the whole of such property to the use of the wife and her children. Davis v. Newton, 6 Metcalf, 544. "The Court may in its discretion, give the whole, or part only of the property, to the wife, according to the circumstances of the case." 2 Kent, (5th ed.) 140; Haviland v. Bloom, 6 John. Ch. 178, 180, 181; Udall v. Kenney, 3 Cowen, 590.

a Settlement.

Wife's right to Sleech v. Thorington (y), the husband was gone abroad, leaving his wife unprovided for, and yet all the Court appeared disposed to do, in conformity with a case there mentioned by the Master of the Rolls, was to direct the payment of the interest of the money to her till he returned and maintained her." In Bond v. Simmons (z), the wife having brought the husband a considerable portion, of which no settlement was made, and he afterwards filing a bill for a legacy left her, the Court decreed a settlement should be made, but he obstinately refusing to make a settlement, and dying, it was held she was entitled to the principal and dividends. In Pryor v. Hill (a), creditors under a general assignment to them by the husband for payment of their debts, were held entitled to the life interest of the wife, on making a provision for her. Burdon v. Dean (b), the assignees filed a bill in respect of property belonging to the bankrupt in right of his wife, and the wife claimed a further provision, she having been provided for before The Master of the Rolls said, "it is impossible to give her the whole, for that would be to admit that a married woman is entitled to the whole of her property to her separate use." In Oswell He directed a reference to the Master for a proposal. v. Probert (c), where assignees claimed the estate of the wife in right of her husband, proposals for a settlement were in like manner directed. In Worrall v. Marlar (d), the fund on a claim by assignees was equally divided between the assignees and the wife and children of the bankrupt. In Like v. Beresford (e), where a ward of the Court had been run away with, the Court would not give the husband any part of the wife's fortune. It has a discretion in such cases whether it will give the whole or a part to the In Goose v. Davis, in 1794, not reported but mentioned in the sixth edition of Mr. Cooke's Bankrupt Law (f), the Lord Chanceller referred the report back to the Master, to be attended by the assignees; the Master having by his report approved a settlement of the whole fund.

> In Wright v. Morley (g), says Sir J. Leach, V. C., says "when the husband becomes a bankrupt, and consequently incapable of maintaining his wife, it is not held that she is entitled to the whole of the dividends of her fortune, or of any life interests that she

⁽y) 2 Ves. 560. (z) 3 Atk. 20; and see Mitford v. Mittord, 9 Ves. 87; Wright v. Morley, 11 Ves. 17.

⁽a) 4 Bro. C. C. 139. (b) 2 Ves. J. 607. (c) 2 Ves. J. 680.

⁽d) 1 P. Wms. 459, in note by Mr.

Cox; S. C. 1 Cox, 158; see also Brown v. Clarke, 3 Ves. 166; Free-man v. Pasley, 3 Ves. 421; Lumb v. Milnes, 5 Ves. 517.

⁽c) 3 Ves. 506. (f) Edit. by Gregg, p. 287. (g) 11 Ves. p. 20, 21.

may have any more than she is entitled to the whole of her fortune, Wife's right to consisting of a capital sum." In the case of Brett v. Greenwell (h), Mr. Baron Alderson took a distinction between a bankrupt and an insolvent, and gave to the wife of the latter the whole of a fund the Court bequeathed to her. This distinction has however been repudiated by Sir E. Sugden in Napier v. Napier (i); and it seems that the general rule is to give half to the creditors of a bankrupt or insolvent, and the residue to his wife and children (k).

In the case of Coster v. Coster (k), where the husband had without sufficient cause separated from his wife, and left her wholly unprovided for, the V. C. of England ordered three-fourths of a fund in Court, arising from property bequeathed to the wife, to be settled on her and her issue, and the remaining fourth to be paid to her husband.

It is to be observed, that under the marriage Act, 4 Geo. IV. c. In case of a 76, s. 23, in the case of a marriage solemnized between parties clandestine marriage all under age, by false oath or fraud, the guilty party is to forfeit all property must property accruing from the marriage; but such property may, by be settled. order of the Court, made upon information filed by the Attorneygeneral, be secured for the benefit of the innocent party, or the issue of the marriage, as the Court shall think fit, so as to prevent the offending party from deriving any interest in any estate, or pecuniary benefit from the marriage; under this Act it has been held that the Court has no discretion to mitigate the penalty, but in the case of the property being that of the wife, is bound to settle and secure all such property, past present and future, for the benefit of herself or the issue of the marriage (1).

It appears formerly to have been considered, that if the husband Effect of prehad made a settlement upon his wife upon their marriage, the wife vious settlewould be debarred of her right to further provision out of any property which might subsequently accrue to her (m); but it seems now to be settled that the Court, according to the power which it uses, and the care which it always takes of the interest of femes covert, will, where there is a slender provision only made for the wife by settlement before marriage, on an accession of fortune, if it be considerable (not a trifle only), oblige the husband to make a further provision for her (n). In such cases, however, much

⁽A) 3 Y. & C. Exchr. R. 230.

⁽i) 1 Dr. & W. 410.

⁽k) Whitten v. Sawyer, 1 B. 593. (k) 9 Sim. 597.

⁽l) Attorney-general v. Mulloy, 4 Russ. 329.

⁽m) Lanoy v. Duchess of Athol, 2 Atk. 448.

⁽a) March v. Head, 3 Atk. 720; Tomkyns v. Ladbroke, 2 Ves. 591. 595; Stackpole v. Beaumont, 3 Ves. 98; Lady Elibank v. Montolieu, 5 Ves. 737

a Settlement.

Wife's right to must depend upon the terms of the settlement; for if it appears, either by express words or by fair inference, that it was the intention of the parties that the husband should be the purchaser of the future as well as the present property of the wife, the Court will not require the husband to make an additional settlement. such cases, however, the settlement for this purpose must either express it to be in consideration of the wife's fortune, or the contents of it altogether must import that, and plainly import it, as much as if it were expressed (o) (1).

Does not attach upon life interest only, her.

The right of a wife to a settlement, does not attach upon property in which she has a life interest only; such property belongs unless husband to the husband, jure mariti, subject to the obligation before nofails to support ticed as being imposed upon him by the law, of maintaining her (p). If the husband fail in that obligation either by the desertion of his wife, or by his inability to assist in her support, in consequence of bankruptcy or insolvency, the Court, as in the case of the interest arising from her capital, fastens the obligation upon the property itself, and will give her a provision out of it, in the one case against the husband, and in the other against his assign-Thus in the case of Sturgis v. Champneys (q), where the wife of an insolvent debtor was entitled for life to large landed property, and it happened that the legal estate therein was outstanding in mortgages, which circumstance rendered it necessary for the provisional assignee to come into Equity to perfect his title, objections to the claim of the wife for a settlement were made upon the ground that her life estate in lands could not be considered as an equitable interest, merely in consequence of the legal estate being outstanding, and that the right to a settlement had never been held to extend either to interests of that description or to rents of real estate, but Lord Cottenham, after review-

⁽o) Per Lord Eldon, in Druce v. v. Parsley, ib. 421; Lumb v. Milnes, enison, 6 Ves. 395. 5 Ves. 517; Elliott v. Cordell, 5 Mad. Denison, 6 Ves. 395.

⁽p) Burdon v. Dean, 2 Ves. J. 608; Oswell v. Probert, 2 Ves. 680; 155; Aguilar v. Aguilar, ib. 414; Pryor v. Hill, 4 Bro. C. C. 139. Brown v. Clark, 3 Ves. 166; Freeman (q) 5 M. & C. 105.

⁽¹⁾ In Haviland v. Bloom, 6 John Ch. 178, the rule in Equity was considered as settled, that the wife's equity to a suitable provision for the maintenance of herself and her children, out of her separate estate, lying in action, was a valid right, and extended not only to property, which she owned dum sola, but to property descended or devised to her during coverture. A new equity arises to the wife upon property newly acquired, and attaches upon it equally as upon that which she brought with her upon marriage In Ex parte Beresford, 1 Desaus. 263, the Court, after a full discussion, ordered a new settlement in favor of the wife on a new accession of fortune. See Carr v. Taylor, 10 Sumner's Vesey, 574.

ing the cases upon the subject, observed, "that if the life estate be Wife's right to attainable by the husband or his assignee at Law, the severity of this law must prevail; but if it cannot be reached otherwise than by the interposition of this Court, Equity, though it follows the law, and therefore gives to the hasband or his assignee the life estate of the wife, yet it withholds its assistance for that purpose, until it has secured to the wife the means of subsistence: it refuses to hand over to the assignee of the husband, to the exclusion of the wife, the income of the property which the law intended for the maintenance of both;" but it would appear, that where a wife has an ample separate provision, secured to her by settlement or from other sources, the principle which declares her to be entitled to a provision out of her life estate, against her husband's general assignees, or against his incumbrancers upon her estate, will not apply (r). It has been held also not to apply in the case of a particular assignee of the wife's life estate who purchased it, when the husband was maintaining the wife, and before any circumstances had raised a present equity in the property for the wife (s).

The wife's equity for a settlement is not for her benefit only, but Is for benefit of for that of herself and children (t); and though, as has been be well as herself. fore stated, she may upon her examination waive it, she cannot take it for herself, and give it up for them. The only instance in which a different course was ever adopted, appears to have been in the case of Johnson v. Johnson (u); in that case a fund in Court belonging to the wife having been assigned by the husband, an order was made, (the wife being examined and consenting,) that part should be transferred to the assignee, and that the other part should be paid to the separate use of the wife, with liberty for the persons entitled to apply on her death. Upon an application made by the assignee after the death of the wife, who had survived the husband, Sir Thomas Plumer, M. R., refused to make the order, saying, that it was quite an unusual thing to make, in this manner, a partial settlement upon the wife alone, directing the interest to be paid to her for life, it being quite clear that the children must be included. His Honor, however, was of opinion, that as the order had been made above thirty-four years ago, he could not alter it, and directed the payment of the money to the second husband

⁽τ) See cases note (p).
(s) Elliott v. Cordell, ubi supra.
(t) Murray v. Lord Elibank, 10
Ves. 84; Lloyd v. Williams, 1 Mad.

^{450;} Re Walker, L. & G., temp. Sug.; Hodgens v. Hodgens, 4 Cl. & F. 323.

dren.

Does not survive to chil-

Wife's right to of the wife (the wife consenting), on the ground that the wife was a Settlement.

entitled by survivorship.

But though the equity which compels the 'husband to make a settlement out of the wife's personal estate is the right of the children as well as of the wife, yet it does not survive to the children after her death (x) (1), but in such case the whole fund will go to the husband by survivorship. It has been thought that Sir Thomas Sewell, in the case of Cockel v. Phipps (y), acted in direct contradiction to Lord Northington's decision upon this point in Scriven v. Tapley. It appears, however, from the very elaborate judgment of Sir Thomas Plumer, V. C., in Lloyd v. Williams (z), that the case has been erroneously reported, and that it does not bear upon the question.

Except where contract or order for settlement in her lifetime.

In Murray v. Lord Elibank (a), and particularly in the abovecited case of Lloyd v. Williams, all the previous cases and the reasoning upon the subject have been collected and commented upon; and it appears from them to have been the opinion both of Lord Eldon and of Sir T. Plumer, that the children have no equity after the death of the mother, unless there has been a contract or a decree for a settlement in her lifetime (b). If, however, there has been an order or decree referring it to the Master to approve a proper settlement to be made upon a married woman and her children out of the property of the woman, and she die before the Master has made his report, the children will have a right to a settlement, under the order, out of their mother's property (c); and it seems that the children are clearly entitled to assert this right by supplemental bill (d).

Attaches upon filing of bill.

From the opinions expressed in the above-mentioned cases of Murray v. Lord Ellibank, and Lloyd v. Williams it seems that Lord Eldon and Sir Thomas Plumer considered that the equity of the wife to a settlement in favor of herself and children, did not attach till after a decree or order referring it to the Master to approve of a settlement. And in the case of De la Garde v. Lempriere (e), where the wife was a defendant to a bill filed for the administration of an estate, in which she was interested as a legatee, Lord Langdale, M. R., observing, that she had filed no bill claim-

(x) Scriven v. Tapley, 2 Ed. 337; Amb. 509, S. C.

(y) 1 Dick. 391. (z) 1 Mad. 450.

(a) 10 Ves. 84. (b) 1 Mad. 467. (c) Murray v. Lord Elibank, 10 Ves. 84.

(d) Ibid. 84; 13 Ves. 1; S. C. 14 Ves. 496, S. C.

(e) 6 Beav. 344.

^{(1) 2} Story Eq. Jur. § 1417, and note.

r,

ing a settlement, and had died before any order for a settlement Wife's right to was made, decided against the equity of the children after her a Settlement. death to a settlement, thereby overruling the case of Steinmetz v. Halthin (f), where Sir J. Leach, V. C., appears to have come to a different conclusion, and to have considered that the right of the wife to a settlement does not depend upon the decree or order for referring it to the Master to approve a settlement, but attaches upon the property immediately upon the filing of the bill, which gives the Court jurisdiction as to that property, whether the bill be filed by the wife or by others; and that when once the equity of the wife has attached upon the property, it continues for the benefit of the children, notwithstanding the death of the wife before the settlement is executed. In that case the bill was instituted by the executors of the will, under which the wife became entitled to the property, praying the direction of the Court concerning it, and the wife had died before answer, and the Court held her children entitled to the money on the ground that the right had attached upon the filing of the bill, and the wife had done no act to waive it (1).

But whether the equity of the wife to a settlement, for the benefit May be waived of herself and children, attaches upon the property so early as the at any time before actual period of filing the bill, or not, it is clear that the wife may at any execution. time before the execution of a settlement, even after the Master has actually approved of one under a decree, appear in Court and waive her right, so as altogether to defeat her children (g) (2). She cannot, however, after insisting upon her right to a settlement as against her husband's assignees in bankruptcy, subsequently waive her equity, and defeat her children's interest (h).

With respect to the question of whether it is competent to the After contract wife, by consent in Court, to waive her right to a settlement for husband. herself and her issue, after a contract entered into on the part of the husband to make one, it is to be observed, that in ex parte Gardiner (i), Lord Hardwicke held that she might waive it as far as her own interest was concerned, but not for her children. that case a reference had been made to the Master to approve a

⁽f) 1 Glynn & J. 64. (g) Rowe v. Jackson, 2 Dick. 604; Murray v. Lord Elibank, 10 Ves. 84; Martin v. Mitchell, cited 10 Ves. 89;

Steinmetz v. Halthin, 1 Glynn & J.

⁽k) Whittem v. Sawyer, 1 Beav. 593; Barker v. Lea, 6 Mad. 330.

⁽i) Anon. 2 Ves. 671.

⁽¹⁾ Murray v. Lord Elibank, 10 Sumner's Vesey, 84, note (a); 2 Story Eq. Jur. § 1417. (2) 2 Story Eq. Jur. § 1418.

a Settlement.

Wife's right to proper settlement, in consequence of which, proposals had been given in and signed both by husband and wife, by which he was to settle an estate in Jamaica in strict settlement. Before the matter was ultimately concluded, the husband and wife went to Jamaica, where they staid six years, and upon their return, there being no children, they preferred a petition to have the money paid out of Court to the husband, the wife consenting; but Lord Hardwicke refused the application, being of opinion that the proposal was binding, and that if the husband had died abroad, and had left children, such children would have been entitled, under those articles, to have had it carried into execution.

> The same rule was subsequently acted upon by Sir J. Leach, V. C., in Fenner v. Taylor (i), and though that decision was afterwards revised by Lord Brougham, yet, as that reversal was upon the ground that what the Vice-Chancellor had treated as a binding agreement, had on a former occasion been considered by Sir William Grant as merely voluntary, and such as the Court of Equity would not carry into effect, the principle upon which the case was originally determined, must be considered as undisturbed by the reversal of the Vice-Chancellor's decision.

After a reference, the death of neither husband nor wife affect the right by survivorship.

It seems that if after a reference to approve of a settlement, one of the parties die before the settlement be approved of by the Court, and there are no children of the marriage, the right of survivorship as between the husband and the wife is not affected. Thus in Macaulay v. Philips (k), Lord Alvanley laid it down, that if the wife had died even after a proposal had been made by the husband under such an order, the husband would have been entitled. His Lordship, however, said, that he did not mean to determine what the case would have been if the proposal had been approved of by the Court, and a settlement ordered to be made (as perhaps then the Court would have considered it as actually made), and that he was far from determining that in such a case the settlement would be entirely at an end; on the contrary, he thought it would be binding, and that the accident would make no difference.

Forfeited by adultery.

It may be observed here, that if the wife be an adultress, living apart from her husband (1), a Court of Equity will not interfere upon her application for a settlement out of her own choses in action, neither will it order them to be paid to her husband; not to

son for the Court refusing her claim to a settlement. Eedes v. Eedes, 11 Sim. 569.

¹ Sim. 169; 2 Russ. & M. 190, not in a state of adultery, is not a rea-

⁽k) 4 Ves. 19.

⁽l) 1 Roper, H. & W. 283. But the mere living apart from her husband, if

the former, because she is unworthy of the Court's notice or inter- Wife's right to ference; nor to the latter, because he does not maintain her, in respect of which duty only the law gives to him her fortune (1) Accordingly, in Carr v. Eastabrooke (m), cross petitions were presented by the husband and the wife, the one praying that 350%. belonging to her might be settled to her separate use, the other that the money might be paid to the husband without his making any provision for her. The wife had eloped and had lived in adultery, and her husband had obtained a divorce a mensa et thoro, but at the time of the application the adulterer was dead, and the wife was supported by his mother: the Lord Chancellor said he could make no order upon either petition, that he could not settle the sum to the wife's separate use, and that he must leave it as it was. But the rule is different in instances of female wards of the Court Unless where a who are married without its consent; for although they afterwards marries clanlive in adultery, the Court will enforce a settlement (n); because destinely. the marriage being a contempt, the Court thereby obtained jurisdiction to commit the husband, in consequence of his misconduct, until he should make a proper settlement, and will not part with that power until that act be done, whatever may be the irregularity of the wife's conduct, which may be attributed in some degree to her husband's conduct in procuring such a clandestine marriage.

With respect to the order, which is usually made upon an appli- Form of order. cation for the property of the wife, in case the wife does not consent, the terms of it are, that it be referred to the Master to inquire. and state to the Court whether any settlement has been made; and in case the Master shall find that none has been made, or if any has been executed, if he does not approve of the same, then the husband is to be at liberty to lay proposals before the Master, and the Master is to state the same, with his opinion, to the Court (o). Where a reference is made to the Master to approve of a Where a prior proper settlement upon the wife out of a particular property, it is always usual to direct the Master to have regard to any settlement which the husband may have made upon the wife aliunde. as the extent of the provision out of the particular property in question may be affected by any prior settlement made by the husband, so also in making such provision, regard ought to be had

⁽m) 4 Ves. 146; see also Ball v. Montgomery, 2 Ves. J. 191; and Watkyns v. Watkyns, 2 Atk. 97.

⁽n) Ball v. Coutts, 1 Ves. & Bea.

⁽o) Seton on Dec. 269; Hand's Prac. 217.

a settlement.

Wife's right to to any other property which may have been possessed by the husband in right of his wife; for the adequacy of the prior settlement to the equity of the wife, must depend upon the amount of the other property possessed in her right (p). The usual order in such cases, therefore, is, to refer it to the Master to approve of a proper settlement upon the wife and children, "regard being had to the extent of the wife's fortune, and to any settlement which may already have been made upon her."

In what cases femes covert may sue.

Where the property of a married woman is a subject of equitable cognizance, it is not material whether the aid of the Court is sought by the wife, or by the husband or his representatives or assignees; and it is now certain that a feme covert may herself file a bill for the purpose of having that to which she is entitled secured to her and her family (q). In Lady Elibank v. Montolieu (r), where a bill was filed by a married woman, against her husband, Lord Thurlow said, that the only difficulty he had was, upon the form of the suit, whether a married woman, by her next friend, could be a plaintiff in this Court; but that with respect to that difficulty, if upon the point of law, she was entitled, and there was no way of asserting her right against her husband but by bill, that objection he thought did not weigh much, and his Lordship ultimately made the decree.

Against their husbands.

No doubt, therefore, can be now entertained, that a wife may, under such circumstances, be the plaintiff in a suit against her husband (1). It seems to be now settled, that all cases in which the husband and wife sue as co-plaintiffs together, or in which the husband sues as next friend of his wife, are regarded as suits of the husband alone. And upon this principle, where a married woman, having a separate interest, joins as a co-plaintiff or co-defendant with her husband, instead of suing by her next friend, or answering separately, the suit or defence, will not prejudice a fu-

(p) Green v. Otte, 1 S. & S. 254; Bond v. Simmons, 3 Atk. 20; Elibank v. Montolieu, 5 Ves. 744.

(q) Worrall v. Marlar, cited in Mr.

Cox's note to Bosvil v. Brandon, 1 P. Wms. 459, where the cases on this subject are collected.

(r) 5 Ves. 743.

⁽¹⁾ A wife may, in a Court of Equity, sue her husband, and be sued by him. 2 Story Eq. Jur. § 1368, § 1414; Van Duzen v. Van Duzen, 6 Paige, 366; Story Eq. Pl. § 61, and note, and cases cited to this point; Long v. White, 5 J. J. Marsh. 230; Dowell v. Covenhoven, 5 Paige, 581.

A husband, who has received the rents and profits of real estate, held in trust for the separate use of the wife, who has separated from him, is rightly joined as a defendant in a bill by her against the trustees to enforce the trust. Ayer v. Ayer, 16 Pick. 327.

ture claim by the wife in respect of her separate interest (s); and it has been decided, that a suit by a husband and wife against the trustees of the wife's separate property, cannot be pleaded in bar to a subsequent suit by her and her next friend, against the trustees and her husband, although the relief prayed in both suits is the same (t).

Suits by Femes Covert.

In general, therefore, where the suit relates to the separate property of the wife, it is necessary that the bill should be filed in her name by her prochein amy, otherwise the defendant may demur upon the ground, that the wife might at any future time institute a new suit for the same matter; and that upon such new suit being instituted, a decree in a cause over which the husband had the exclusive control and authority, would not operate as a valid bar against her subsequent claim (u) (1). Where, however, the suit is for a chose in action of the wife, not settled to her separate use, neither can the defendant object to the husband's suing jointly with her as co-plaintiff; nor, will her right to a settlement be prejudiced by the fact of her husband being so joined with her in the suit, but the Court will take care of her interests, by not suffering the money to be paid to her husband on the prayer of his counsel, because it knows that the instructions to counsel come from the husband who has the control of the suit. In such cases, therefore, the Court expects that the wife should attend in Court, or before commissioners, and give her consent before it will make an order for payment to her husband (z) (2).

As a wife may sue her husband in respect of her separate prop- In what cases erty, so may a husband in a similar case sue his wife (y) (3). husband may sue wife. Such suit, however, can only be in respect of his wife's separate estate; for a husband cannot have a discovery of his own estate against his wife (z). In these cases, where it is necessary that a Wife must sue suit respecting the property of a married woman should be insti- by next friend; tuted against her husband, or that the husband should be one of the defendants, as the wife being under the disability of coverture cannot sue alone, and she cannot sue under the protection of her

⁽s) Hughes v. Evans, 1 S. & S. 185. (t) Reeve v. Dalby, 2 S. & S. 464. (u) Wake v. Parker, 2 Keen, 59;

see also Warren v. Buck, 4 Beav. 95, as to the time when the objection can be taken by the defendant.

⁽z) Pawlet v. Delaval, 2 Ves. 663, 669; see also Mole v. Smith, 1 J. & W. 665.

⁽y) Warner v. Warner, 1 Dick. 90; Ainslie v. Medlicott, 13 Ves. 266.

⁽z) Brooks v. Brooks, Prec. Ch. 24.

Story Eq. Pl. § 63, and note; Sigal v. Phelps, 7 Simons, 239.
 See Ball v. Montgomery, 2 Sumner's Vesey, 191, note (d).
 2 Story Eq. Jur. § 1368; Story Eq. Pl. § 62.

Suits by Femes Covert. husband, she must seek other protection, and the bill must be exhibited in her name by her next friend (a) (1), who is also named as such in the bill, as in the case of an infant (b). A bill, however, cannot, as in the case of an infant, be instituted by a next friend on behalf of a married woman, without her consent, and if a suit should be so instituted, upon her affidavit of the matter it will be dismissed (c) (2).

Next friend need not be a relation, but son of substance.

The prochein amy of a married woman need not be a relation, but he must be a person of substance, because he is liable to must be a per- costs (d); and in this respect there is a material difference between the prochein amy of a feme covert and of an infant, for any person may file a bill in the name of an infant, but the suit of a feme covert is substantially her own suit, and her next friend is selected by her. In the former case, therefore, as we have seen (e), the Court does not require that the next friend should be a person of substance, because if the friends of an infant are poor, the infant might, by such a rule, be deprived of the opportunity of asserting his right, but in the case of a feme covert, as the object for which a prochein amy is required is, that he may be answerable for the costs, the Court expects that the person she chooses to fill that office should be one who can pay the costs if it should turn out that the proceeding is ill-founded; and it has even gone the length of saying, that where the next friend of a married woman takes the benefit of an Insolvent Act, it will not suffer the cause to proceed till the next friend is changed, or security is given for the costs (f).

May be changed, when.

In the case of Lawley v. Halpen (h), a feme covert plaintiff was permitted to change her next friend after considerable progress had been made in the cause, but the order was only made upon

 (a) Griffith v. Hood, 2 Ves. 452.
 (b) Lord Red. 22. Where the husband is under any of the disabilities enumerated in the commencement of this Chapter, in such case the wife is considered as a feme sole, and may sue without the intervention of a next friend.

(c) Andrews v. Cradock, Prec. Ch. 376; Gilbert Rep. 36, S. C.; and Cooke v. Fryer, 4 Beav. 13.

(d) Anon. 1 Atk. 570.

(e) Ante, p. 80, 81.
(f) Pennington v. Alvin, 1 S. & S. 264. In the case of Drinan v. Mannix, 3 Dr. & W. 154, before the Lord Chancellor Sugden, when the same person sued as next friend of a feme covert and of her infant children, the Court ordered the proceedings to be stayed until the next friend of the feme covert was changed or security for costs was given.
(A) Bunb. 310.

⁽¹⁾ Story Eq. Pl. § 61, § 63; Dowell v. Covenhoven, 5 Paige, 581; Ludlow v. Maddock, 8 Paige, ; Wood v. Wood, 8 Wendell, 357; Garlick v. Strong, 3 Paige, 440. See Knight v. Knight, Taylor, 120; Kenly v. Kenly, 2 How. 751.

⁽²⁾ Story Eq. Pl. § 61; Randolph v. Dickerson, 5 Paige, 751.

condition that the new next friend should enter into a recognizance to answer all the costs, as well those which had accrued before, as those which would accrue after, his appointment.

Suits by Femes Covert.

In the case of Greenaway v. Rotheram (i), a suit was instituted by a husband and wife, and their infant children, by their father as next friend, respecting separate property of the wife, in which the children also were interested. Pending the suit, the husband absconded, whereupon the wife presented a petition, praying that some person might be appointed her next friend, and that a new next friend might be appointed for her children. The V. C. of England said, he had no jurisdiction to make the order asked for, but that he would order that some person, to be appointed by the wife, should be allowed to prosecute the suit in the name of the plaintiff, without prejudice to any lien which the husband's solicitor might eventually have for his costs.

In Barlee v. Barlee (k), where the next friend of a married Death of next woman died pending the suit, the Court ordered, upon the appli- the suit. cation of the defendant, that the bill should be dismissed unless a new next friend be named within two months.

In that case it is also to be observed, that the Court made it part of the order, that in case the bill should be dismissed, the costs of the defendant should be paid out of the fund in Court, which fund had arisen from the rents of the wife's separate estate. which was the subject of litigation; from which it appears that the property of a married woman in the hands of the Court will be considered liable to the costs of a suit instituted by her touching that property (1).

If a bill has been filed by a feme sole, and she intermarry pend- Suit abates by ing the suit, the proceedings are thereby abated, and cannot properate plainerly be continued without a bill of revivor. If, however, a female tiff. plaintiff marries, and afterwards proceeds in the suit as a feme sole, the mere want of a bill of revivor is not an error for which a decree can be reversed upon a bill of review brought by a defendant, because, after a decree made in point of right, a matter which may be pleaded in abatement, is not an error upon which to ground a bill of review (m).

⁽i) 9 Sim. 88. (k) 1 S. & S. 100. (l) See the case of Otway v. Wing,

^{. 12} Sim. 90. (m) Viscountess Cranborne v. Dal-

mahoy, Nels. R. 85; S. C. 1 Ch. R. 231. So at law, if a woman sues or

is sued as sole, and judgment is against her as such, though she was covert, she shall be estopped, and the sheriff shall take advantage of the estoppel; 1 Salk. 310; 1 Roll. Abr. 869, pl. 50.

Suits by Fomes Covert.

It has been determined, that if a female plaintiff marries pend ing a suit, and afterwards before revivor her husband dies, a bill of revivor becomes unnecessary, her incapacity to prosecute the suit being removed; the subsequent proceedings ought, however, to be in the name and with the description which she has acquired by the marriage (x).

Effect of death of husband.

Where a bill has been filed by a man and his wife, touching the personal property of the wife, and the husband dies pending the suit, no abatement of the suit takes place, but the wife, unless any act has been done which may have the effect of depriving her of her right by survivorship, may continue the suit without filing a bill of revivor (1). If, however, she does not think proper to proceed with the cause, she will not be liable to the costs already incurred, because a woman cannot be made responsible for any act done by her husband during the coverture; but if she take any step in the cause subsequent to her husband's death, she will make herself liable to the costs from the beginning (0).

Effect of death of wife.

A different rule with respect to the right to continue a suit instituted by a husband and wife, prevails when the wife dies in the lifetime of her husband, from that which is acted upon when the husband dies in the lifetime of his wife, for in that case, although the husband upon the death of his wife becomes entitled to all ber choses in action, he does not acquire such title by survivorship, but in a new character, and an absolute abatement of suit takes place, so that to entitle himself to continue it, the husband must first clothe himself with the character of her personal representative by taking out administration to her effects, and then proceed to file a bill of revivor (2). And here it is to be observed, that if after the death of the wife the husband were to die before the termination of the suit, the party to continue the suit would not be the personal representative of the husband, although such personal representative would be the party entitled to the money; and it is remarkable that in such a case, the Ecclesiastical Court considers itself bound to grant administration to the next of kin of the wife, and not to the personal representative of the husband (p), although such administrator will be considered in Equity as a

Death of husband after wife.

⁽a) Godbin v. Earl Ferrars, Lord Atk. 726, and Bond v. Simmons, ib. Red. 47, n. 21.

⁽o) Lord Red. 47; vide stiam, 3 (p) Wms. on Executors, 344, 910.

⁽¹⁾ M'Dowl v. Charles, 6 John. Ch. 132; Vaughan v. Wilson, 4 Hen. & Munf. 453.

⁽²⁾ See Pattee v. Harrington, 11 Pick. 221.

trustee for the representative of the husband. The same rule is Wife's right by observed by the Ecclesiastical Courts where the husband, having taken out administration to his wife, dies before he has administered all her property; in such case also the Ecclesiastical Courts consider themselves bound to commit the administration de bonis non to the next of kin of the wife, and not to the representatives of the husband, although they are the parties entitled to the property (q).

But although it is in general necessary that a husband, after the Wife's right by death of his wife, pending a suit instituted by them for the recovery of her personal property, should, in order to entitle him to proceed with the cause take out administration to his wife, and then file a bill of revivor; yet if any act has been done, the effect of which would have been to deprive the wife, in case she had outlived her husband, of her right by survivorship, and to vest the property in the husband absolutely, the husband may, it is apprehended, continue the suit in his individual character without taking out administration to his wife (1).

In such case, however, it will be necessary, if such act has taken place subsequently to the institution of the suit, to bring the fact before the Court by means of a supplemental bill, unless it appears upon the proceedings which have already taken place in the cause.

This distinction renders it important to consider what the How defeated. circumstances are which will have the effect of so altering the property as to vest the right to the wife's personal property absolutely in the husband, and entitle him to proceed in a suit without assuming the character of her personal representative.

Upon this subject it is to be observed, that a mere intention (2) Not merely by to alter the property will not have the effect of giving the husband action at Law; the absolute right in it, and that therefore the mere bringing an action at Law, or filing a bill in Equity, will not alter the property, unless there be a judgment or decree for payment to the husband alone (3).

## (q) Ibid.

⁽¹⁾ See Blount v. Bestland, 5 Sumner's Vesey, 515, Perkins's note (a), and cases cited.

⁽²⁾ See Forrest v. Warrington, 2 Desaus. 254, 261.
(3) See Strong v. Smith, 1 Metcalf, 476.

Wife's right by Survivorship. or appropriation.

How defeated by payment into Court ;

or transfer by order in lunaсy.

Where money account;

or transferred to trustees.

And so it has been decided, that an appropriation by an executrix of so much of the assets of her testator as was necessary to discharge a legacy bequeathed to a married woman, was not such a change of the property as would vest it in the husband; but it seems, that if a person indebted to a married woman, or holding money belonging to her, pay such money into Court in a cause to which the husband and wife are parties, such payment will be considered as an alteration of the property; for as properly it could only have been paid during coverture to the husband, the circumstance of its having been made into Court will not alter the rights of the parties, and it will be considered as a payment made to him (r). For the same reason, where the jewels of the wife had been deposited in Court by the husband under an order, they were considered as belonging to the husband's executors, and not to the representative of the wife who had survived, because, having been in the possession of the husband, even a tortious act could not devest that property and turn it into a chose in action (s), much less could a payment into Court under an order. And so where a married woman, who was the committee of the estate and person of her lunatic husband, was entitled to stock which was standing in the name of a trustee for her, and this stock was by an order made in the lunacy transferred into the name of the Accountant-general in the matter of the lunacy, and part of it was afterwards sold out and applied in payment of costs in the lunacy, Lord Lyndhurst held, that the mode in which the stock had been dealt with amounted to a reduction into possession by the husband; because as payment by the trustee to the lunatic. or to the committee, would have been a reduction into possession; so payment into Court to the credit of the lunacy, was equally a reduction into possession for the lunatic; and upon this ground his Lordship refused to grant a petition, presented by the wife after the death of the lunatic, praying that the stock might be transferred to her, as belonging to her by survivorship (t). If. carried to joint however, money paid into Court be carried by order to the joint names of the husband and wife, the case will be different, and the wife will not be deprived of her right of survivorship, in the case of the husband dying before he has procured an order for the payment of it out of Court (u); and it seems that a mere payment or transfer of money or stock to trustees for the benefit of the

⁽r) Packer v. Wyndham, Prec. Ch.

⁽t) In re Jenkins, 5 Rus. 183. (u) Ibid.

⁽s) Ibid.

wife, will not give the husband the absolute right to the money to Wife's right the exclusion of the wife.

It appears formerly to have been held that a promissory note Effect of progiven to a wife during coverture, became the property of the hus- missory note band absolutely, as the wife could not acquire property during coverture, and upon this principle, Lord Hardwicke, in Lightbourne v. Holyday (z), held, that upon the death of the husband in a suit respecting a note of this description, the suit abated, and in Hodges v. Beverley (y), it was determined that a note given to a feme covert, was, upon her husband's death, to be considered as his assets (1). But in Nash v. Nash (z), Sir Thomas Plumer, Payment of V. C., held, that a note given to a wife was a chose in action of part to husband insuffithe wife, and survived to her on the death of her husband; and cient as to rethat the circumstance of the husband having received the interest sidue. and part of the capital in his lifetime, for which he gave a receipt, did not alter the nature of the property, but that the remainder of the money still remained a chose in action.

In the last case a receipt of part of the money by the husband His receipt a was not, as we have seen, held sufficient to alter the nature of the sufficient reduction. property in the remainder so as to deprive the wife of her right to

- (v) Bunb. 188. See Yates v. Sherringtom, 11 M. & W. 42, and 12 M.
- (z) 2 Eq. Ca. Ab. 1; 2 Mad. 135, & W. 855, as to the effect of bankruptcy of the husband upon a promissory note given to the wife dum sols. (z) 2 Mad. 133.

⁽¹⁾ See Shuttleworth v. Noyes, 8 Mass. 229. In Commonwealth v. Manly, 12 Pick, 173, it was held, that a premissory note given to a feme covert for her separate use, for the consideration of her distributive share in an intestate estate, becomes immediately the property of the husband. The Court say in the same case, that a legacy given to the wife vests absolutely in the husband, and he may release it either before or after it becomes payable. So the wife's distributive share in an intestate estate rests in the husband: p. 175. See also Goddard v. Johnson, 14 Pick. 352; Hapgood v. Houghton, 22 Pick. 480. In reference to the wife's legacy and distributive share in an intestate estate, if it is intended by the above to hold that they vest absolutely in the husband without some act to reduce them to possession, the law is clearly otherwise. See Blount v. Bestland, 5 Sumner's Vesey, 515, Perkins's n. (a), and cases cited; 2 Kent, 5th ed.) 135; Parsons v. Parsons, 9 N. Hamp. 309; Strong v. Smith, 1 Metcalf, 476; Hayward v. Hayward, 20 Pick. 517; Snowhill v. Snowhill, 1 Green Ch. 30; Harleston v. Lynch, 1 Desaus. 244; Clifton v. Haig, 4 Desaus. 330; Poindexter v. Blackburn, 1 Ired. Eq. 286; Wallace v. Tahaferro, 2 Call, 447; Gallego v. Gallego, 2 Brock. 285; Robinson v. Brock, 1 Hen. & Munf. 214; Schuyler v. Hoyle, 5 John. Ch. 196; Irvin v. Divline, 7 Munroe, 246; Wardlaw v. Gray, 2 Hill Ch. 651; Bennett v. Dillingham, 2 Dana, 438; Elms v. Hughes, 3 Desaus. 161; Dumond v. Magee, 4 John. Ch. 318. See also Wheeler v. Bowen, 20 Pick. 563; Holbrook v Waters, 19 Pick. 354; Goddard v. Johnson, 14 Pick. 352; Revel v. Revel, 2 Dev. & Bat. 272; Krause v. Beitel, 3 Rawle, 199; Griswold v. Penniman, 2 Conn. 564; South v. Hoy, 3 Monroe, 93; Wilkinson v. Perin, 7 Munroe, 216; Walker v May, 1 Bailey Eq. 58; Hardie v. Cotton, 1 Ired. Eq. 61; Bilis v. Baldwin, 1 W. & S. 258. estate, if it is intended by the above to hold that they vest absolutely in the

Survivorship. or that of a person authorised by him.

Wife's right by it by survivorship. In general, however, if the husband, either alone or jointly with his wife, authorize another person to receive the property of the wife, whether it be money, legacy or other thing, and such person actually obtain it, such receipt will change the wife's interest in the property, and be a reduction into possession by the husband (1). Thus, in Doswell v. Earle (a), where an executor, with the wife's consent, had paid a legacy, to which the wife was entitled upon the death of her mother, to the husband, upon his undertaking to pay the interest to the mother during her life, and the wife having survived her and her husband filed a bill claiming the money against her husband's executors, the bill was dismissed.

> The mere proof of a debt due to the wife by the husband under a fiat or commission of bankrupt against the debtor, will not alter the property of the debt, and it still remains a chose in action (b). It seems, however, that an award by an arbitrator giving money to the husband, to which he was entitled in right of his wife, will have the effect of altering the property and giving it to the husband absolutely (c).

With respect to the effect of a judgment at Law in altering the

of a judgment at Law.

Effect of an award.

Where wife not a party.

property of a wife's chose in action, much depends, as we have seen, upon whether the wife is or is not named in the proceeding. If the wife be not a party, (which she need not be at Law, if the right accrued to the wife during coverture,) a judgment in an action commenced by the husband will vest the property in the husband, so that in the event of the death of the husband before execution, the wife would be deprived of her right by survivorship (d): this, however, will not be the case if the wife be a party. in which case, if the husband die after judgment and before execution sued out, the judgment will survive to her (e) (2).

Where she is.

Effect of decree in Equity.

Decrees in Equity, as we have seen, so far resemble judgments at Law in this respect, that until the money be ordered to be paid, or declared to belong to the one or the other, the rights of the parties will remain undisturbed (3); but an order for payment of

(a) 12 Ves. 473. (b) Anon. 2 Vern. 707. c) Oglander v. Batson, 1 Vern.

⁽d) Oglander v. Batson, 1 Vern.
396; Garforth v. Bradley, 2 Ves. 677.
(e) Garforth v. Bradley, 2 Ves. 677.

 ² Kent, (5th ed.) 137; Schuyler v. Hoyle, 5 John. Ch. 196.
 See 2 Kent, (5th ed.) 137, 138; M'Dowl v. Charles, 6 John. Ch. 132; Searing v. Searing, 9 Paige, 283.
(3) See Heygate v. Annesley, 3 Bro. C. C. (Perkins's ed.) 362, Mr.

Eden's note (a), where the cases on this subject are cited and considered.

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a sum of money to the husband in right of his wife, changes the Wife's right by property and vests it in the husband (f).

Where, however, a decree or order has been made by the Court, Decree for for the payment of a sum of money to the husband and wife, and payment to husband and either party dies before payment, the money will belong to the wife, survives survivor (1). Thus, where a plaintiff and his wife brought their to wife. bill against an executor for a legacy bequeathed to the wife before marriage, and a decree was made that the money should be paid to the plaintiffs; upon a question whether the money should go to the wife or to the administratrix of the husband, the Court referred it to one of the Judges to certify, who gave it as his opinion, that a decree in Chancery for money or any other personal thing, being a judgment in Equity, was of the like nature with, and ought to be governed by, the same rules as a judgment for a debt or damages at Common Law, and consequently that the interest or benefit of the decree, and the money due thereby, ought to go and be to such of the parties as should have the right thereto in case it were a judgment for debt or damages at Common Law, according to which, if a judgment be had by husband and wife in an action brought by them for a debt due to the wife before marriage, and the husband dies after the judgment and before execution sued, the debt due on the judgment belongs to the wife, and she may sue execution upon the judgment, and not the executor or administrator of the husband (q). Upon the same principle, in Forbes v. Phipps (h), where a decree was made that one-sixth of the residue to which the wife was entitled, should be paid to her and her husband, and the wife died before the money was received, it was determined by Lord Northington, that the husband was entitled to the money, not as administrator to the wife, but as survivor under the decree.

With respect to the effect of an assignment by the husband of Effect of hushis wife's chose in action upon her right of survivorship, it has band's assignbeen for some time settled, that where the chose in action is not capable of immediate reduction into possession, as where it is in reversion or expectancy, an assignment of it will not bar the right

⁽g) Nanney v. Martin, 1 Ch. Rep. 89; Coppin v. —, 2 P. Wms. 496. (k) 1 Eden, 502. (f) Heygate v. Annesley, 3 Bro. C. C. 362; [Perkins's ed. note (a), and cases cited.]

⁽¹⁾ If there be a decree in Equity in favor of the husband and wife, and the husband dies, the decree will survive to the wife, though her name might ot have been necessarily joined in the proceedings. Muse v. Edgerton, C. W. Dud. Eq. 179.

Wife's right by which the wife would otherwise have had to possess it in the event of her surviving her husband, unless it is actually reduced into possession before his death (1).

No difference between legal and equitable choses in ac-

It appears formerly to have been considered that in this respect there existed a difference between legal and equitable choses in action, or, to speak more correctly, between choses in action and equitable interests in the nature of choses in action, with respect to which latter it appears to have been thought that an assignment of them by the husband would, in certain cases, without any reduction into possession before his death, have the effect of defeating the wife's right to them by survivorship; and attempts have been made to establish distinctions in this respect between assignments for valuable consideration and assignments without consideration or by operation of law, the former having been considered as barring the right of the surviving wife, and the latter as not having The decisions, however, of Sir Thomas Plumer in Hornsby v. Lee (i), and Purdew v. Jackson (k), have removed all doubts upon this subject; and have shown that no such distinction as that supposed between legal and equitable choses in action, or between assignments of the latter for valuable consideration. and voluntary or general assignments, exists (2).

Nor between assignments for valuable consideration and those by act of law, or without consideration.

> In Purdew v. Jackson, the question came a second time before the same Judge, Sir T. Plumer; and he then, after long argument, and a diligent and careful investigation of all the cases which had occurred upon the point, expressed his opinion to be; "that all assignments made by the husband of the wife's outstanding personal chattel, which is not or cannot be reduced into possession, whether the assignment be in bankruptcy or under the Insolvent Act, or to trustees for the payment of debts, or to a purchaser for a valuable consideration, pass only the interest which the husband has subject to the wife's right by survivorship" (1).

> The decision of Sir Thomas Plumer in the above cases has since received the sanction of Lord Lyndhurst in Honner v. Mor-

(i) 2 Mad. 21; see also Hutchings v. Smith, 9 Sim. 137.

(k) 1 Russ. 1. (l) 1 Russ. 70.

⁽¹⁾ Post, 154, note.

⁽²⁾ It is said by Mr. Chancellor Kent, 2 Kent, (5th ed.) 137, that a voluntary assignment by the husband of the wife's choses in action without consideration will not bind her, if she survives him. See also to the same effect, Hartman v. Dowdel, 1 Rawle, 279; Parsons v. Parsons, 9 N. Hamp. 321, 322; Saddington v. Kinsman, 1 Bro. C. C. (Perkins's ed.) 51, and notes; Mitford v. Mitford, 9 Sumner's Vesey, 87, note (b).

ton (m), and of Sir John Leach in Watson v. Dennis (n). It will Wife's right by have been observed that the rule, as laid down by Sir Thomas Plumer, is confined to such outstanding personal chattels of the wife as are not or cannot be reduced into possession; and in consequence of this and other statements of the doctrine by Lord Hardwicke and Lord Lyndhurst, an opinion was till a very short time ago prevalent, that the rule did not apply to assignments for valuable consideration of such choses in action as at the time of In a chose in the assignment were capable of reduction into possession, or as of being rebecame reducible into possession before the death of the husband. duced into pos-An assignment of a chose in action, under these circumstances, the lifetime of was supposed to have had the effect of barring the wife of her the husband. right of survivorship, even though no actual reduction into possession took place before the death of the husband.

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session during

In support of this opinion, there is a dictum of Lord Hardwicke, in Bates v. Dandy (o), who puts this question, "Can a husband assign a chose in action of his wife, so as to bind her?" He then answers it thus, "I do agree, that he cannot voluntarily do it without any consideration; but I am of opinion, that for a valuable consideration he may assign, and I have always taken that to be the distinction;" and in Johnson v. Johnson (p), which was the case of an assignment by the husband for a valuable consideration of a fund in Court belonging to the wife, Sir Thomas Plummer said, "If it were now a new point, it would be difficult to understand how the assignee could be in a better situation than the husband himself, for the assignment does not reduce it into possession: it still remains a chose in action, and its being a chose in action gives the wife a right by survivorship. But it is too late to consider this, for it is decided that an assignment for valuable consideration being a disposition of the property, is sufficient to bar the right of the wife surviving."

This distinction between the effect of an assignment upon the wife's right of survivorship, where the chose in action is capable of immediate reduction into possession, and where it is not, was also sanctioned by Lord Lyndhurst in Honner v. Morton (q). His Lordship is there reported to have said, that " at Law the choses in action of the wife belong to the husband if he reduces them into possession; if he does not reduce them into possession, and dies before his wife, they survive to her. When the husband assigns the chose in action of the wife, one would suppose, on the first im-

⁽m) 3 Russ. 65. (n) 3 Russ. 90; and see Stamper v. (o) 2 Atk. 207; sed vide 1 Russ. 20, 33, notis; and 3 Russ.
(p) 1 Jac. & W. 472-476. Barker, 5 Mad. 157.

⁽q) 3 Russ. 65.

Wife's right by pression, that the assignee would not be in a better situation than the assignor, and that he too must take some steps towards reducing the subject into possession, in order to make his title good against the surviving wife. But Equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do as actually done; and therefore, where the husband has the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession (1)."

> It would appear, however, from the most recent cases, that the distinction which has been thus pointed out, between the effect of an assignment for valuable consideration by the husband upon a chose in action which is capable of being reduced into possession, and one which is not, can no longer be relied upon (2). In the case of Elwin v. Williams (r), certain marriage articles were entered into between the mother of the intended wife, then a minor, and the future husband, whereby they covenanted that all and every the share and interest of the future wife of and in the real and personal estate and effects of her grandfather, in which the mother had a life interest, should upon the wife attaining the age of twentyone years, be settled upon certain trusts therein mentioned. The mother died in 1821, and in 1823, when the wife had attained the age of twenty-one years a settlement was executed in pursuance of the marriage articles, whereby all the share and interest of the wife under the will of her grandfather, was conveyed to trustees upon certain trusts corresponding with the trusts of the marriage articles. The husband died in 1838, and the bill was filed by the trustees of the settlement for the purpose of having their rights as trustees, declared concerning the residuary property of the wife's grandfather. It was contended on the part of the widow, that she was not bound by the articles made previous to the marriage, or the settlement executed subsequently, since no part of the residu-

No distinction between assignments capable of being reduced into possession and those not so.

(r) 12 Law J. Rep., N. S. Chan. 440; and 13 Sim. 309.

⁽¹⁾ The husband may assign, for a valuable consideration, his wife's choses in action to a creditor, free from the wife's contingent right of survivorship. Such an appropriation of the property is the exercise of an act of ownership Such an appropriation of the property is the exercise of an act of ownership for a valuable purpose, and an actual appropriation of the chattel, which the husband had a right to make. 2 Kent, (5th ed.) 136, 137; Schuyer v. Hoyle, 5 John. Ch. 196; Kenney v. Udall, 5 John. Ch. 464; Lowry v. Houston, 3 Howard (Miss.) 394; Siter v. Jordan, 4 Rawle, 463.

(2) 2 Kent, (5th ed.) 138, note (a); Siter v. Jordan, 4 Rawle, 468; Meriwether v. Booker, 5 Litt. 256; Pinkard v. Smith, Litt. Sel. Ca. 331; Dade v. Alexander, 1 Wash. 30.

ary property of her grandfather had been reduced into possession Wife's right by by her husband during her life; on the other hand it was contended that the husband had power to assign the chose in action of his wife, which he might have reduced into possession during his life, and therefore that the covenant of the husband in the articles before marriage, with the confirmation by settlement after marriage, vested the property in the trustees of the settlement. The V. C. of England after referring to the authorities upon the subject, concluded by saying, "whether the husband dies in the lifetime of the tenant for life, whereby the chose in action cannot as against the wife be reduced into possession, or whether he survives and dies before it is reduced into possession, the same result must in my opinion follow: and the consequence is, that in the present case a declaration must be made, that the husband's covenant which might operate as an assignment, does not now affect that part of the chose in action of the wife which was not reduced into possession in his lifetime." The same point recently came before Sir J. L. Knight Bruce, V. C. (s), who after stating that he agreed in the opinion expressed in the last-mentioned case of Elwin v. Williams, decided that an assignment by a husband for valuable consideration of a wife's chose in action, which had fallen into his power during his life, but had not been in fact reduced into possession by him, did not prevent the right to the chose in action from surviving to the wife.

In the case moreover of assignments by acts of law, no distinc- In assignments tion exists between assignments of choses in action capable of im- by acts of law, no distinction mediate reduction into possession, and those which are not so; between choses thus in Pierce v. Thorneley (t), where a married woman had a in action capable of reducvested interest in possession in a legacy, and her husband became tion into posbankrupt and died, it was decided that the widow, and not the session, and assignee, was entitled to the money, because the assignment in those not so. bankruptcy could not pass to the assignee a larger right or better title than the husband himself had, which was a right to reduce the legacy into possession, which was not done in his lifetime (1).

⁽s) Ashby v. Ashby, 14 Law J., N. 8. Chanc. 86.

⁽f) 2 Sim. 167; and see Gayner v. Wilkinson, 2 Dick. 491; S. C. 1 Bro. C. C. 50, n.

⁽¹⁾ A general assignment in bankruptcy or under insolvent laws, passes the wife's property, and her choses in action, but subject to her right by survivorship; and if the husband dies before the assignces have reduced the property to possession, it will survive to the wife, for the assignees possess the same rights as the husband before the bankruptcy, and none other. 2 Kent, (5th ed.) 138, and notes; Van Epps v. Van Deusen, 4 Paige, 64; Outwell v. Van Winkle, 1 Green Ch. 516; Mitford v. Mitford, 9 Sumner's Vesey, 87, Perkins's notes (a), and (c); Saddington v. Kinsman, 1 Bro. C. C.

Wife's right by Of course the assignment under bankruptcy passes the whole interest of the husband in the wife's chose in action at the time of the bankruptcy: and therefore in Ripley v. Woods (u), where a man whose wife was entitled to personalty, subject to a life interest in her mother, became a bankrupt and obtained his certificate, and afterwards the tenant for life died, and then the wife, to whom the husband took out administration, Sir A. Hart, V. C., decided that the assignees of the husband were the persons entitled to the fund in dispute, because the husband, by the marriage, had an incipient right to the chose in action which would become vested in his wife if she survived her mother; and as that event had happened in the lifetime of the husband, it became vested in her, so that the husband could have reduced it into possession: the husband, therefore, had at his bankruptcy an incipient right, which was capable of being passed by the assignment; and as the events which happened would have given the husband the whole interest by survivorship in case he had not been a bankrupt, it was held that the whole right of the husband vested in the assignees by virtue of the assignment, which had given them the right in its incipient state.

Assignment by husband will not deprive wife of right to a settlement.

Wife's concurrence in assignment will not give it effect, where otherwise invalid.

It is to be observed here, than an assignment by the husband of his wife's equitable chose in action, will neither have the effect of depriving the wife of her right to it in the event of her surviving her husband (1) nor of depriving her of her equitable right to a settlement out of it, should any application for that purpose be made by her during the lifetime of her husband (y) (2). And even the wife's concurrence in the assignment by her husband during coverture, will not have the effect of rendering such assignment valid against her claim by survivorship in cases where an assignment by her husband alone would not have had that consequence. Where also a feme covert is an infant, the circumstance of her father being party to the deed will not alter the interest of the wife, for although it is true that the law of this Court permits a father or guardian of a female infant to contract before marriage on her part with her intended husband as to her personal estate, because otherwise it would become his property, and as to her jointure, because her benefit and the convenience of families re-

(u) 2 Sim. 165.

(y) Ante, p. 98.

⁽Perkins's ed.) 44, notes; ante, 131; Mitchell v. Winslow, 2 Story, C. C.

⁽¹⁾ Ante, 154, note. (2) Ante, 131, note.

quires it, there is no principle or authority for stating that after Wife's right by marriage a parent or guardian can bind the interest of an infant Survivorship. feme covert (z).

With respect to the effect of a release by the husband in depriving his wife of her right by survivorship to her choses in action not reduced into possession during the coverture, it appears that he can release debts due to her before marriage, legacies absolutely given to her (a), interests accruing to her under the Statute of Distributions, and the like (1); and these acts may be done by him although he and his wife be divorced a mensa et thoro, because the marriage still subsists (b). In the recent case of Hore v. Becher (c). a single woman being entitled to an annuity, secured by bond, married. Her husband executed a release of the annuity, and died leaving his wife surviving. It turned out that the release had been executed under a mistake and was inoperative, so that it was not necessary to decide upon its effect on the wife's right by survivor-The V. C. of England, however, observed, "If a man gives a bond or a promissory note to secure an annuity to a single woman, and she afterwards marries, her husband may release the bond or note, and if he release the security, there is an end to the annuity."

It does not, however, seem quite clear in what cases an assign. Effects of husment or release by the husband during coverture of his wife's an- band's release nuity prevents her rights by survivorship to payments accruing af- in action. ter his death. It would seem to depend somewhat upon the question whether the particular annuity could be considered as an entire chattel, or whether each successive payment thereof (d) constituted a separate reversionary interest.

It was formerly argued, upon the authority of a dictum of Lord Effect of as-Holt in Gage v. Acton (e), "that where the wife has any right or release by husduty which by possibility may happen to accrue during the mar-band of wife's riage, the husband may release or discharge it," that the release annuity. by the husband of a reversionary interest of the wife would have

⁽z) Stamper v. Barker, 5 Madd. 157, vide etiam Duke of Chandos v. Talbot, 2 P. Wms. 602; Whitmarsh v. Robertson, 14 L. J. Rep. Ch. 157; nor can she consent in Court. (a) Gilb. Eq. R. 88; 2 Roll. Rep. 134.

⁽b) Stephens v. Totty, Noy, 45; Cro. Eliz. 908. (c) 12 Sim. 465.

⁽d) Stiffe v. Everitt, 1 M. & C. 37; Thompson v. Butler, Moore's Rep. 522; Whitmarsh v. Robertson, 1 Y. & C. 715.

⁽e) 1 Salk. 327; 1 Lord Ray. 515.

^{(1) 3} Kent, (5th ed.) 135, 137; Commonwealth v. Manley, 12 Pick. 175; Marshall v. Lewis, 4 Litt. 141; Tentle v. Muncy, 2 J. J. Marsh, 82; Schuyler v. Hoyle, 5 John. Ch. 196.

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Wife's right by the effect of barring her right by survivorship; from what has before been said, it is clear that this dictum in its full extent is not in accordance with the present law; as, in the language of Sir T. Plumer, M. R. (f), "if the wife's chose in action is in contingency, depending on the event of survivorship, the husband may release his own right, but he cannot bar or release hers;" and in Honner v. Morton (g), Lord Lyndhurst observes, "whether the dictum (of Lord Holt in Gage v. Acton) be or be not accurately reported, I will not undertake to say; but in the judgment in which it occurs, Lord Holt differed from the rest of the Court, and the decision was contrary to his opinion. From the decision there was an appeal which was afterwards abandoned. Lord Kenyon, when the case was cited before him, pronounced the opinion there delivered by Lord Holt, to be 'as repugnant to the rules of Law as of Equity'" (h).

It is to be observed, that the rules which have been above laid down, apply to those interests of the wife which are of a strictly personal nature; with respect to those interests which fall under the description of chattels real, distinctions exist with respect to the effect of an assignment of a husband in barring his wife of her right in them by survivorship; which distinctions are important with reference to the question of abatement, and to other points incidental to suits in Equity relating to property of that description.

In chattels real,

defeated by assignment of husband.

If he survive, he takes them as a marital right.

The interests which the law gives to the husband in the chattels real which a wife has or may be possessed of during marriage, is a qualified title, being merely an interest in right of his wife, with a power of alienation during coverture (i); so that if he do not dispose of his wife's terms for years or other real chattels in his lifetime, her right by survivorship will not be defeated; if, however, he do not alien them, and he survive his wife, the law gives them to him, not as representing the wife, but as a marital right (1). Thus if a feme coverte has a term for years, and dies, the lease is the husband's, and he may maintain ejectment without taking out letters of administration (k); and if a wife, tenant for a term of years of a copyhold, marries and dies before the term

(g) 3 Russ. 65. (h) 4 T. R. 385.

(f) Purdew v. Jackson, 1 Russ. 1. sessed of a term of years, and having (g) 3 Russ. 65. married an alien, the marriage is not a gift in law of the term.

(k) Pale v. Michell, 2 Eq. Ca. Ab. p. 138, Pl. 4 n. (a).

⁽i) In a marginal abstract, 9 Mod. 104, it is said, that a wife being pos-

^{(1) 2} Kent, (5th ed.) 134. The wife's interest in a chattel real may be assigned by the husband. Meriwether v. Booker, 5 Litt. 256.

is expired, the husband shall continue without any new admission Wife's right by or fine (1). These rules equally apply where the interest of the wife in the chattel is only equitable; thus where a term of years No distinction determinable upon lives was assigned to trustees in trust for a wo-between legal man who married and died, upon a question whether this trust chattels; or went to the husband, who survived, or to the wife's administrator, between trust it was held clearly that the trust of a term, as well as the term it- the term itself. self, survived to the husband, and that he need not take out administration (m); and so, as we have seen in the last case (n), if a man assign over the trust of a term which he has in right of his wife, this shall prevail against the wife though she survives. doctrine, as far as regards the trust of a term assigned to a trustee for a wife before marriage, appears to have been first laid down by the House of Lords on appeal in Sir E. Turner's case (o), which, from the report of the subsequent case of Pett v. Hunt, appears to have excited the surprise of Lord Chancellor Nottingham, who, however, after some hesitation, said he must be concluded by the Lords' judgment, and decreed accordingly. The ground of the decision in Sir E. Turner's case appears to have been this, that as the husband can at Law dispose of a term for years, so he may dispose of the trust of a term in Equity, because the same rule of property must prevail in Equity as well as at Law (p), and this has ever since been considered as the law of the Court (q). Upon the same principle it has been held, that even where the term had been assigned to trustees for the separate use of the wife by her first husband, the second husband may sell or dispose of it, though he has made no provision for his wife (r). In Walter v. Saunders (s), In terms seta distinction was attempted to be drawn in argument between a tled to her septerm in trust to raise money for a woman, and a trust of the term first husband. itself for the woman, but the Master of the Rolls determined that No difference no such distinction could be taken (t). It has also been held, that between term if the wife has a judgment, and it is extended upon an elegit, the and a term in husband may assign it without consideration. So, if a judgment trust to raise be given in trust for a feme sole who marries, and, by consent of money for her. her trustees, is in possession of the land extended, the husband may assign over the extended interest; and by the same reason,

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in trust for her.

(o) 1 Vern. 7, S. P.

⁽l) Earl of Bath v. Abney, 1 Dick. 260, arg.
(m) Pale v. Michell, 2 Eq. Ca. Ab.
138, pl. 4.
Wyndham, Sanders

⁽a) Packer v. Wyndham, Sanders v. Page, 3 Ch. Rep. 223; Pitt v. Hunt, 1 Vern. 18; 2 Cha. Ca. 73.

⁽p) Per Lord Hardwicke, in Jewsonv. Moulson, 2 Atk. 417, 421.

⁽q) Bates v. Dandy, 2 Atk. 207; Incledon v Northcote, 3 Atk. 430.

⁽r) Tudor v. Samyne, 2 Vern. 270. (s) 1 Eq. Ca. Ab. 58, pl. 5.

⁽t) Vide etiam Packer v. Wyndham, ubi supra.

Survivorship. Where a decree for a feme to hold lands between wife's mortgage in

fee and for a term. Where a trust of a term asfor wife with consent of husbe disposed of by him.

Wife's right by if a feme has a decree to hold and enjoy lands until a debt due to her is paid, and she is in possession of the land under this decree and marries, the husband may assign it without any consideration, for it is in the nature of an extent (u). It seems also to be settled. till a sum paid. that a husband may also assign his wife's mortgage in fee as well No distinction as her mortgage for a term (z) (1), though the contrary appears to have been considered as law in Packer v. Wyndham (v).

It is to be observed, that although the husband is considered entitled to assign the trust of a term or other real chattel created for the benefit of his wife, yet where a term or chattel real signed in trust has been assigned in trust for a feme with the privity or consent of her husband, then without doubt he cannot dispose of it (z). band, it cannot fortiori he may not if he make a lease or term of years for the benefit of his wife (a). And where a term was raised out of the wife's inheritance, and vested in trustees for purposes which were satisfied, and subject thereto for the benefit of the wife, her executors, administrators and assigns, it was held, that the particular purpose being served for which the term was raised, the trust did not go to the husband, who was the administrator of the wife, but followed the inheritance (b). From this it may be inferred, that the assignment of the trust of such a term by the husband in the lifetime of the wife, would not affect the wife's interest in it by survivorship.

In an anonymous case which occurs in 9 Modern Reports (c), it appears that a feme covert, but who had been divorced a mensa et thoro, and had alimony allowed to support her, applied to the Court to restrain her husband from proceeding to sell a term of years of which she was possessed before her marriage, and that the Court at first refused the injunction, because the separation a mensa et thore did not destroy the marriage, and during the time the marriage continued, the husband had the same power to dispose of the term which he had in right of his wife, as he would have had if it had been in his own right; but afterwards, upon counsel still pressing for an injunction, in order that the merits of

⁽u) Lord Carteret v. Paschall, 3 P. Wms. 200.

⁽z) Bates v. Dandy, 2 Atk. 207; Bosvil v. Brander, 1 P. Wms. 459.

⁽y) Ubi supra.
(z) Sir E. Turner's case, 1 Vern.
7; vide etiam Bosvil v. Brander, 1 P. Wms. 458; Pitt v. Hunt, 1 Vern. 18, where Lord Nottingham, however,

said, that to prevent a husband, he

must be a party to the assignment.
(a) Wicke's case, Scacc. Pasc. 8
Jac. cited 1 Vern. 7, Ed. Raithby, notis.

⁽b) Best v. Stampford, 2 Freem. 288; S. C. 2 Vern. 520; Prec. Ch. 252

⁽c) 9 Mod. 43.

⁽¹⁾ See Marshall v. Lewis, 4 Litt. 141; Hunter v. Hallett, 1 Edw. 388.

the cause might come before the Court, and insisting very much Wife's right by upon the hardship of the case, the Court granted it, on the ground that though the marriage continues notwithstanding the divorce, yet under such circumstances the husband does nothing in his capacity of husband, nor the wife in that of wife. It is to be remarked, however, that this was merely an interlocutory order to prevent the term being parted with by the husband till the question should be properly discussed, and it does not appear that any further proceedings were ever had in the cause.

It seems that an absolute transfer or assignment by the husband Agreement by of his wife's term of years or other chattel real is not requisite to husband to deprive the wife of her survivorship, but that since an agreement chattels real, to do an act is considered in Equity the same as if the act were will deprive her of survidone, so if the husband agree or covenant to dispose of his wife's vorship. term of years, such covenant will be enforced although he dies in her lifetime (d).

The power which the law gives the husband to alien the whole Assignment or interest of his wife in her chattels real, necessarily authorizes him under-lease by to dispose of it in part; if, therefore, the husband be possessed of against her pro a term of years in right of his wife or jointly with her, and demise tanto. it for a less term, reserving rent, and dies, such demise or underlease will be good against her although she survive him, but the residue of the original term will belong to her as undisposed of by her husband (e).

So also if the husband alien the whole of the term of which he Assignment is possessed in right of his wife, upon condition that the grantee upon condition, and entry pay a sum of money to his executors, and then dies, and the confor breach, dition is broken, upon which his executors enter upon the lands, where breach this disposition by the husband will be sufficient to bar the wife of place in his her interest in the term, it having been wholly disposed of by him lifetime. during his life, and vested in the grantee (f).

It seems, however, that if the condition had been so framed that Where breach it might have been broken in the husband's lifetime, and he had may happen entered for the breach, and had then died before his wife without during his life. making any disposition of the term, she would be entitled to it by survivorship, because the husband, by re-entry for a breach of the condition, was returned to the same right and interest in the term as he was possessed of at the time of the grant, viz. in right of his wife (g).

⁽d) Bates v. Dandy, ubi supra; vide etiam, Head v. Cragh, 9 Mod. 13; Shannock v. Bradstreet, 1 Sch. & Lef.

⁽e) Sym's cases, Cro. Eliz. 33; Co. Lit. 46, b.

⁽f) Co. Lit. 46, b. (g) Vide Watts v. Thomas, 2 P. Wms. 364-366.

Wife's right by Survivorship.
No difference between voluntary assignment and assignment for valuable consideration of chattels real.

In cases of assignments by the husband of his wife's chattels real, the wife will be equally barred of her survivorship, whether the assignment be for a valuable, or without any consideration (A); but it is to be observed that there is a great distinction where the disposition is of the whole or part of the property, and where it is only a collateral grant of something out of it; for although if a husband pledge a term of years of his wife for a debt, and either assign or agree to assign all or part of such term to the creditor, the transaction will bind the wife (i); yet if the transaction be collateral to, and do not change the property in the term, as in the grant of a rent out of it, then if the wife survive the husband, her right being paramount, and her interest in the chattel not having been displaced, she will be entitled to the term discharged from the rent (k).

Where rents reserved upon underlesse of wife's term.

In regard to the right of the husband's executors or his surviving wife to rents reserved upon under-leases of her chattels real, and to the arrears of rents due at the husband's death, there is a difference of opinion in the books, which may probably be reconciled by attending to the manner in which the rents were re-Accordingly, if the husband alone grant an under-lease of his wife's term of years, reserving a rent, that would be a good demise, and bind the wife as long as the sub-demise continued; the husband's executors, therefore, would, as it is presumed, be entitled not only to the subsequent accruing rents, but to the arrears due at his death (1). And it would seem that the principle of the last case would entitle the executors, to the exclusion of the surviving wife, to subsequent rents and all arrears at the husband's death, although the wife was a party to the under-lease, provided the rent were reserved to the husband only, because the effect of the sub-demise and reservation was an absolute disposition pro tanto of the wife's original term which she could not avoid, and the rent was the sole and absolute property of the husband (1). But if in the last case the rent had been reserved by the husband to himself and wife, then as their interests in the term granted and the rent reserved were joint and entire, it is conceived that the wife, upon surviving her husband, would be en-

⁽k) Lord Carteret v. Paschal, 3 P. Wms. 197. (i) Bates v. Dandy, ubi sup. (k) Co. Lit. 184. b. (l) 1 Roll. Abr. 344, 345; Co. Litt. 46, b.; 2 Lev. 100; 3 Kebb. 300.

⁽¹⁾ The rents and profits of a wife's real estate, which accrue during coverture, belong absolutely to the husband, and do not survive to the wife at his death. Clapp v. Stoughton, 10 Pick. 463.

titled to the future rents, and that she would be equally entitled Wife's right by to the arrears of rent at her husband's death, because they remaining in action, and being due in respect of the joint interest of the husband and wife in the term, would, with their principal the term, survive to the wife (m). It may lastly be remarked that, by the law of Scotland the choses in action of the wife become the property of the husband, without any condition on his part of reducing them into possession. If, therefore, an English testator leaves a legacy to a married woman domiciled in Scotland, and her husband dies before payment, the legacy is the property of the husband's representatives, and not of the widow. Where, however, in such a case, the executors paid the legacy to the widow, in ignorance of the law of Scotland, the payment to her was held to be good (n).

(n) Leslie v. Baillie, 2 Y. & C. c. Vin. Abr. (d. a.) 117. (m)

## CHAPTER IV.

OF THE PERSONS AGAINST WHOM A SUIT MAY BE INSTITUTED.

## SECTION I. - Who may be defendants to a Suit.

HAVING pointed out the persons who are capable of instituting suits in Equity, and considered the peculiarities of practice applicable to each description of parties complainant, we come now to the consideration of the persons against whom suits may be commenced and carried on, and the practice of the Court as applicable to them.

All bodies politic and corpo-rate, and all other persons, except the Sovereign and the Queen, who are sued nies-general.

A bill in Equity may be exhibited against all bodies politic and corporate, and all other persons whatsoever, who are in any way interested in the subject-matter in litigation (1), except only the Sovereign and the Queen-consort and the heir-apparent, whose prerogatives prevent their being sued in their own names, though they may in certain cases, as we shall see presently, be sued by by their Attor- their respective Attornies or Solicitors-general (2).

 (1) Story Eq. Pl. § 68.
 (2) In England, the King and Queen, though they may sue, are not liable to be sued; and in America a similar exemption generally belongs to the Government or State. Story Eq. Pl. § 69.

No direct suit can be maintained against the United States, without the au-

thority of an act of Congress, nor can any direct judgment be awarded against them for costs. Marshall C. J. in Cohens v. Virginia, 6 Wheat. 411, 412; U. ted States v. Clarke, 8 Peters, 444; United States v. Barney, C. C. Maryland, 3 Hall, Law J. 128; United States v. Wells, 2 Wash. C. C. 161.

land, 3 Hall, Law J. 128; United States v. Wells, 2 Wash. C. C. 161. But if an action be brought by the United States, to recover money in the hands of a party, he may, by way of defence, set up any legal or equitable claim he has against the United States, and need not in such case be turned round to an application to Congress. Act of Congress, March 3d, 1797, ch. 74, § 3, § 4; United States v. Wilkins, 6 Wheat. 135, 143; Walton v. United States, 9 Wheat. 651; United States v. McDaniel, 7 Peters, 16; United States v. Ringgold, 8 Peters, 163; United States v. Clarke, 8 Peters, 436; United States v. Robeson, 9 Peters, 319; United States v. Hawkins, 10 Peters, 125; United States v. Bank of the Metropolis, 15 Peters, 377.

Formerly one of the United States might be sued by the citizens of another

Formerly one of the United States might be sued by the citizens of another State, or by citizens or subjects of any foreign State. See Chisholm v. State of Georgia, 2 Dallas, 419.

The law in this respect was, however, changed by an amendment of the Constitution of the United States, which (Art. XI. of the Amendments) declares

But although all persons are subject to be sued in Equity, there Who may not are some individuals whose rights and interests are so mixed up and blended with that of others, that a bill cannot be brought and diended with that of other persons are joined with them as Of persons against them unless such other persons are joined with them as Of persons who cannot co-defendants; and there are other individuals who, although their be sued alone. interests are distinct and independent, so that they may be sued alone upon the record, are yet incapable, from the want of maturity or weakness of their intellectual faculties, of conducting their own defence, and must therefore apply for and obtain the assistance of others to do it on their behalf.

be Defendants.

In the first class are included married women whose husbands Femes Covert. must be joined with them as co-defendants upon the record, and persons who have been found idiots or lunatic, whose committees Idiots and lumust be made co-defendants with the persons whose property is natics. entrusted to their care (a).

Under the second head are comprised infants, and all persons Infants. who although they have not been found idiots or lunatics by in- Persons of quisition, are nevertheless of such weak intellects as to be incapa-weak intellects. ble of conducting a defence by themselves, in both which cases the Court will appoint guardians for the purpose of conducting the defence on their behalf.

There is another class of persons, who although they are under no personal disability which prevents their being made amenable to the jurisdiction of the Courts, yet from the circumstance of their property being vested in others, either permanently or temporarily, are not only incapable of being made defendants alone, but, as long as the disability under which they labor continues, ought Bankrupts, innot to be parties to the record at all. In this class are included solvents, outbankrupts, insolvent debtors, outlaws, and persons attainted or convicted of treason or felony.

In the present Chapter the reader's attention will first be direct- Arrangement ed to the case in which the Attorney or Solicitor-general, either of of the Chapter

#### (a) Ld. Red. 23.

that the judicial power of the United States shall not be construed to extend to any suit in law or Equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

This inhibition applies only to citizens or subjects, and does not extend to suits by a State or by foreign States or Powers. The Cherokee Nation v. Georgia, 5 Peters, 1; New Jersey v. New York, 5 Peters, 284. They retain the capacity to sue a State as it was originally granted by the Constitution; and the Supreme Court of the United States has original jurisdiction in the case of suits by a foreign State against one of the members of the Union. See Chisholm v. State of Georgia, 2 Dallas, 418. See also Ex parte Madrazzo, 7 Peters, 627; ante, 22, note.

may be a Defendant.

In what cases the Sovereign or of the Queen-consort, or of the Duke of Cornwall, can be made defendants to a suit, and then to the rules affecting corporations either aggregate or sole, when made defendants on the record; in connection with which will be noticed particular corporate bodies, viz. the Bank of England, East India Company, and South Sea Company, who from the peculiarity of their situation as trustees for the public stock or funds, the management of which has been committed to their care, have been the subject of certain rules and regulations which are not applicable to other corporations.

> The reader's attention will then be called to the rules applicable to the several classes of persons above pointed out, and then to the method of defending a suit in forma pauperis. And lastly, will be pointed out the consequences arising from a person who is a necessary party to a suit, being out of the jurisdiction of the Court.

### SECTION II.

# The Queen's Attorney-general.

In what cases he may be a defendant.

Not where rights of the Crown immediately in ques-

Petitions of right.

ALTHOUGH the Queen's Attorney-general, as representing the interests of the Crown, may, in certain cases, which will be presently pointed out, be made a defendant to a bill in Equity, yet this is to be understood as only applicable to cases in which the interests of the Crown are not immediately concerned; for where the rights of the Crown are immediately in question, as in cases in which he is in actual possession of the property in dispute, or where any title is vested in the Queen which the suit seeks to divest, a bill will not in general lie, but the party claiming must apply for relief to the Queen herself by petition of right (b) (1).

A petition of right to the Queen is in the nature of an action against a subject in which the petitioner sets out his right to that

(b) Reeve v. Attorney-general, cited 1 Ves. 445, 446; Legal Judic. in Chancery, stated 18.

⁽¹⁾ Story Eq. Pl. § 69. Mr. Justice Story in a note to this section in his Equity Pleading remarks that "In America no such general remedy by petition of right exists against the government, or, if it exists at all, it is a privilege created by Statute in a few States only. In cases where the government has an interest in the subject as a matter of public trust, it is presumed, that the Attorney-general may be made a defendant, as he may be in England." Ante, 164, note.

which is demanded by him, and prays the Queen to do him right and justice, and upon a due lawful trial of his right, and title, to make him restitution. It is called a petition of right, because the Queen is bound of right to answer it, and to let the matter therein contained be determined in a legal way, in like manner as causes between subject and subject. This petition is to be determined in Chancery, and the method is this (c); the petition is presented to the Queen who subscribes it with these words, "soit droit fait al partie," i. e. let right be done to the party; and thereupon it is delivered to the Chancellor, in forma juris exequend: i. e. to be executed according to law, and directions are given that the Attorneygeneral should be made a party to the suit (d).

The case of Viscount Canterbury v. The Attorney-general (e), was a petition of right, in which the petitioner, Viscount Canterbury, claimed compensation from the Crown for damage alleged to have been done in the preceding reign, to some property of the petitioner, while Speaker of the House of Commons, by the fire which, in the year 1834, destroyed the two Houses of Parliament. To the petition, a general demurrer was filed by the Attorney-general, and was allowed by Lord Lyndhurst; from whose judgment, it would appear, that the petition of right is the remedy which the subject has for an illegal seizure on the part of the Crown, of lands or goods; but there is no such form of proceeding applicable to a case, which, as between subject and subject, would be a claim for unliquidated damages.

Although, however, in general, a bill cannot be filed against the Attorney-general for the purpose of enforcing equitable rights sued in certain against the direct interests of the Crown, yet in certain cases bills cases in the will be entertained on the Equity side of the Court of Exchequer, as a Court of Revenue, against the Attorney-general, as representing the Queen, for the purpose of establishing claims against the estates or revenues of the Crown, which in the Court of Chancery or other Courts could not have been instituted without proceeding in the first instance by petition of right (f). Thus, in the case of Lutwich v. The Attorney-general, mentioned by Lord Hardwicke in Reeve v. The Attorney-general (g), where Mr. Lutwich had a mortgage in fee on Sir William Perkin's estate, who was attainted, and brought his bill to foreclose, making the Attorney-general a party, the Court of Exchequer, although they would not de-

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⁽c) Coke's Entries, 419, a, 422, b; (f) See 4 & 5 Vic. c. 5, sec. 41, Legal Judic. in Chancery, stated 18. and p. (4). (d) Redesd. Tr. Ch. Pl. 30, 31. (g) 2 Atk. 223.

⁽e) 1 Ph. 306.

In what cases cree a foreclosure against the Crown, granted relief by directing may be a Defendant.

that the mortgagee should hold and enjoy till the Crown thought proper to redeem the estate. So also in Casberd v. The Attorneygeneral (k), the Court relieved an equitable mortgagee of lands, which had been seized under an extent; and it is to be observed, that in the case of Reeve v. Attorney-general, Lord Hardwicke appeared to think, that although in the Court of Chancery be was obliged to dismiss the bill, yet that the Court of Exchequer might of redemption. have granted the relief sought, namely, the performance of a trust against the Crown, where the trust estate had devolved upon the King, in consequence of the death of the surviving trustee without heirs (k).

When the Crown entitled to the equity

In the case of the Crown;

There is another class of suits which may be noticed here, against accountants to the Attorney-general, which have been frequently instituted on the Equity side of the Court of Exchequer, as a Court of Revenue; viz., suits for the purpose of relieving accountants to the Crown against the decisions of the Commissioners for auditing the Public Accounts, under the 25 Geo. III. c. 52.

tion;

but may proceed during

the passing of

It was decided, before the abolition of the equitable jurisdiction who proceed by bill, not by. of the Court of Exchequer, that when public accountants had motion or peti- reason to be dissatisfied with the determination of such commissioners, either in disallowing their articles of discharge or in imposing surcharges, they might proceed in the Equity side of the Exchequer, against the Attorney-general, and not against the commissioners; and that the proper mode of proceeding in such cases was by bill only, and not by motion or petition (1). It was also held, that the statutes providing for the relief of accountants to their accounts, the Crown were not confined to cases where the accountant had actually been sued or impleaded, but that he might proceed immediately, even during the passing of his accounts, by bill in Equity, as it were quia timet (m). There seems no reason to doubt, that accountants to the Crown are now entitled to the same relief; but it may be a question, whether they can now proceed in the Court of Exchequer as a Court of Revenue, or whether, in such cases, they must apply to the Court of Chancery (n).

lief.

from discovery, seeks relief by means of a bill against the Attorney-general, the entitled to re-

(h) 6 Price, 411. (k) Vide Hix v. The Attorney-general, Hardres, 176; vide etiam, Pawlett v. Attorney-general, Hardres,

(l) Colebrooke v. Attorney-general, 7 Pri. 146; Crawford v. Attorney-

general, ibid. 1; Ex parte Colebrooke, 7 Pri. 87; Ex parte Durrand, 3 Anst. 743.

(m) Colebrooke v. Attorney-general, ubi supra.

(n) Attorney-general v. Kingston, 6 Jurist, 155.

Attorney-general cannot, if the accountant is entitled to relief, pro- In what cases tect himself by demurrer from making the discovery sought by the bill, and that in the case of Dean v. Attorney-general, such a demurrer was overruled (o). In that case the Attorney-general had filed an information in the Court of Exchequer, against an army agent, for an account of his dealings with the War-office, upon which the defendant filed a cross bill against the Attorney-general and the Secretary-at-War, alleging that certain transactions had taken place between him and the War-office which amounted to a settlement of accounts, and praying a quietus, &c. To this bill the Attorney-general and Secretary-at-War put in general demurrers, alleging as the cause of demurrer, "that it appeared by the bill that they were sued as officers of his Majesty's government, acting for and on behalf of his Majesty, and concerning matters arising out of and within their duty and employment as such public officers, and not in any manner in their private character as individuals, &c." On the argument of the demurrer, it was alleged on the part of the Attorney-general, that the plaintiff in the cross bill was not entitled to the relief he prayed, and it was strongly urged that not being entitled to the relief, he was not entitled to the discovery; but the L. C. B., Lord Abinger, held, that although the plaintiff was not entitled to the specific relief prayed, yet that, inasmuch as taking the facts stated in the bill to be true, they amounted to a clear defence to the information exhibited against him by the Attorney-general, he was entitled to this sort of relief, namely, to have the benefit of the discovery for the purpose of adducing those facts before the Court in a specific and distinct form, when both the causes should come on together. His Lordship further said, he was not prepared to say that a bill of discovery ever had or ever could be filed against the Attorney-general, for a discovery of facts that could be neither in his personal nor in his official knowledge, or that the Crown would be bound, through the medium of the Attorney-general, to make that discovery; but at the same time it had been the practice, which he hoped never would be discontinued, for the officers of the Crown to throw no difficulty in the way of any proceeding for the purpose of bringing matters before a Court of justice, where any real point that required judicial decision had occurred (1).

(o) 1 Younge & Collyer, 207, Eq. Exchr.

⁽¹⁾ Where the United States bring an action against a party to recover money in his hand, he may set up any legal or equitable claim he has against the United States in his defence. Ante, 164, note, and cases eited.

In what cases may be a Defendant.

Where rights of Crown are

ty;

and Court will not proceed without him.

As where defendant is an outlaw;

or suit relates to boundaries of provinces in a colony;

or parties claim under distinct grants, reserving different rents. Where a title in the Crown appears upon the record, though no claim is made.

In cases in which the rights of the Crown are not immediately concerned, that is, where the Crown is not in possession, or a title vested in it is not sought to be impeached, but its rights are only incidentally involved in the suit, it has generally been considered concerned, but that the Queen's Attorney-general may be made a party in respect not immediate of those rights (p). Thus, where in a litigation between the parties, a question may arise whether the Queen is not the party must be a par- entitled instead of the individuals litigating, it is usual to make the Attorney-general a party to the suit, and this whether any claim has been set up by the Crown or not. Indeed it seems that in all cases of such description, in which any right appears to be in the Crown, or the interest of the Crown may be in any way affected, the Court will refuse to proceed without the Attorney-general, unless it is clear the result will be for the benefit of the Crown (q), or at least that it will not be in disaffirmance or derogation of its interests (r).

Thus in Birch v. Wastall (s) and in Hayward v. Fry (t), where, in consequence of the outlawry of the defendants, it was held that all the defendants' interest was forfeited to the Crown, the Court directed the plaintiff to obtain a grant of it from the Exchequer, and to make the Attorney-general a party to the suit. In Burgess v. Wheate (u), Lord Hardwicke directed the case to stand over, in order that the Attorney-general might be made a party; and in Penn v. Lord Baltimore (x), which was a suit for the execution of articles relating to the boundaries of two provinces in America, held under letters patent from the King, the cause was ordered to stand over for the same purpose. In like manner in Hovenden v. Lord Annesley (y), in which the parties claimed under two distinct grants from the Crown, each reserving a rent but of different amounts, it was held that inasmuch as the rights of the Crown were concerned, the Attorney-general ought to be before the Court (z). In Barclay v. Russell (a), the Lord Chancellor Loughborough dismissed the bill, because a title appeared upon the record for the Crown, although no claim had been made on its behalf. In that case the question arose as to the right to a sum of Bank stock which had been purchased by the government of the province of Maryland before the American war, and vested in the

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(p) Lord Red. 24.
(q) Hovenden v. Lord Annesley,
2 Sch. & L. 618.
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⁽r) Stafford v. Earl of Anglesey, 2 Hardr. 181.

⁽s) 1 P. Wms. 445. (t) Ibid. 446; and vide Rex v.

Fowler, Bunb. 38.

⁽w) 1 Eden. 181.

⁽z) 1 Ves. 444. (y) 2 Sch. & L. 610.

⁽z) Hovenden v. Lord Annealey, 2 Sch. & L. 617.

⁽a) 3 Ves. 436.

may be a De-fendant.

names of trustees for the discharge of certain bills, in respect of In what cases which no claim was ever made. After the peace by which the independence of the American colonies was acknowledged, a bill was filed by certain persons who claimed the stock under an assignment by the new government of the state of Maryland, in opposition to which, claims were set up by the surviving trustee, who, as there was no claims under the bills for the payment of which the trust had been created, insisted upon being beneficially entitled to the whole fund; a claim was also made by the proprietary under the old government, who insisted on a lien upon the stock, in consequence of the confiscation of their property, which took place during the war by the authority of the then legislature of the province, in consequence of the trustees having refused to transfer the stock according to the provision of an Act of that legislature. The Court, however, upon the hearing, was of opinion that none of these parties had any claim upon the stock, and that it was a trust without any specific purpose to which it could be applied, the consequence of which was, that it was for the King to appoint for what purpose the stock should be applied. Upon the same principle, in Dolder v. The Bank of England (b), Lord Eldon refused to order the dividends, which had been received before the filing of the bill, of stock purchased by the old government of Switzerland, to be paid into Court by the trustees, on the application of the new government which had not been recognized by the government of this country, until the Attorney-general was made a party to the suit. But although, in cases where a title in the Crown appears upon the record, the Court will not make a decree unless the Attorney-general is a party to the suit, yet it seems that the circumstance of its appearing by the record that the plaintiff has been convicted of manslaughter, and that a commission of attainder has been issued, will not support a plea for not making the Attorney-general a party, because an inquisition of attainder is only to inform, and does not entitle the Crown to any right (c). It seems, however, that in this respect an inquisition of attainder differs from a commission to inquire whether a person under whom the plaintiff claims was an alien, the former being only for the sake of informing the Crown, but the latter to entitle (d).

The necessity of making the Attorney-general a party, is not Where the confined to those cases in which the interests of the Crown in its Queen is concerned as proown rights are concerned, but it extends also to cases in which tector of the the Queen is considered as the protector of the rights of others. rights of others.

⁽b) 10 Ves. 352. (d) Ibid.

⁽c) Burk v. Brown, 2 Atk. 399.

may be a Defendant.

Where subiect-matter appropriated to charity;

unless where given to officers of a charitable institution already established.

Distinction in gifts to a char-ity where a trustee appointed, and where not so.

In what cases Thus, as we have seen before, the grantee of a chose in action from the Crown may either institute proceedings in the name of the Attorney-general, or in his own name, making the Attorneygeneral a defendant to the suit; and so in suits in which the Crown may be interested in its character of protector of the rights of others, the Attorney-general should be made a party. Thus, the Attorney-general is a necessary party to all suits where the subject-matter is either wholly or in part money appropriated for general charitable purposes, because the Queen as parens patria is supposed to superintend the administration of all charities, and acts in this behalf by her Attorney-general. Where, however, a legacy is given to a charity already established, as where it is given to the trustees of a particular foundation, or to the treasurer or other officer of some charitable institution, to become a part of the general funds of such foundation or institution, the Attorneygeneral need not be a party, because he can have no interference with the distribution of their general funds (e); upon this ground, where a legacy was given to a charity, and upon a bill filed against the executors for an account, an objection was taken because the Attorney-general was not a party, the objection was overruled, and a decree made for an account, because upon such a decree the Master would report that there was such a legacy, and the parties might come in and claim before him (f). And it seems that there is a distinction where trustees of the charity are appointed by the donor, and where no trustees are appointed, but there is a devise immediately to charitable uses; in the latter case there can be no decree unless the Attorney-general be made a party, but otherwise where trustees are appointed by the donor (g); therefore, where a bill was filed to establish a will, and to perform several trusts, some of them relating to charities in which some of the trustees were plaintiffs, and other trustees and several of the cestwi que trusts were defendants, an objection, because the Attorneygeneral was not made a defendant, was overruled, it being considered that some of the trustees of the charity (h) being defendants, there might be a decree to compel the execution of the trusts relating to these charities (i). In that case, it was said by the Lord Chancellor Parker, that if there should be any collusion between the parties relating to the charity, the Attorney-general might,

⁽e) Wellbeloved v. Jones, 1 S. & S.

⁽f) Chitty v. Parker, 4 Bro. 38. (g) 4 Vin. 500, Pl. 11, notis; 2 Eq. Ca. Ab. 267, Pl. 13, n.

⁽A) It appears from a subsequent part of the case that one of the trustees of the charity was abroad.

⁽i) Monil v. Lawson, 4 Vin. 500, Pl. 11; 2 Eq. Ca. Ab. 267.

notwithstanding a decree, bring an information to establish the In what cases charity and set aside the decree, and that he might do the same though he were made a defendant, in case of collusion between the parties; but it seems that the mere circumstance of the Attorney-general not having been made a party to the proceeding, will not be a sufficient ground to sustain an information for the purpose of setting aside a decree made in a former suit, unless the decree is impeached upon other grounds (k).

When it is said that in cases where a legacy is given to the Where charittrustees of a charity already in existence, for the general purposes given to an in of the charity, it will not be necessary in a suit concerning it, to stitution not make the Attorney-general a defendant; the rule must be understood to apply only to those charities which are of a permanent are not denature, and whose objects are defined; for it has been determined, fined. that where legacies are given to the officers of a charitable institution which is not of a permanent nature, or whose objects are not defined, it will be necessary to make the Attorney-general a party to a suit relating to them. Thus, in the case of Wellbeloved v. Jones (1), where a legacy was given to the officers, for the time being, of an academical institution, established at York for the education of dissenting ministers, which officers, with the addition of such other persons as they should choose, (in case they should think an additional number of trustees necessary,) were to stand possessed of the money upon trust to apply the interest and dividends for the augmentation of the salaries of dissenting ministers, a preference being given to those who should have been students in the York institution; and in case such institution should cease, then upon trust that the person in whose names the fund should be invested, should transfer the same to the principal officers for the time being, of such other institution as should succeed the same, or be established upon similar principles; Sir J. Leach, V. C., upon a bill filed by the officers of the institution, praying to have the fund transferred to them, to which the Attorney-general was no party, ordered the case to stand over, with leave to amend by making the Attorney-general a party; his Honor observing, that the Court would never permit the legacy to come into the hands of the plaintiffs, who happened to fill particular offices in the society, but would take care to secure the objects of the testator by the creation of a proper and permanent trust; and upon hearing the cause would send it to the Master for that purpose,

may be a De-

whose objects

and that it would be one of the duties of the Attorney-general to

⁽k) Attorney-general v. Warren, 2 (1) 1 S. & S. 43. Swanst. 291.

may be a Defendant.

Where given to trustees of a charity in existence.

In what cases attend the Master upon the subject. And even in cases where a legacy is given, to the trustees of a charity already in existence, the trusts of which are of a permanent and definite nature, unless it appears from the terms of the bequest that the trusts upon which the legacy is given, are identical with those upon which the general funds of the corporation are held, it is necessary to make the Attorney-general a party (m).

Not where private charity concerned.

It is to be observed also, that the Attorney-general is a necessary party only where the charity is in the nature of a general charity, and that where it is merely a private charity, it will not be necessary to bring him before the Court; thus, where the suit related to a voluntary society, entered into for the purpose of providing a weekly payment to such of the members as should become necessitous, and their widows, Lord Hardwicke overruled the objection that the Attorney-general was not a party, because it was in the nature only of a private charity (n).

Answer of the Attorney-general.

When the Attorney-general is made a defendant to a suit, it is entirely in his discretion whether he will put in a full answer or not (o). The usual course is for him to put in a general answer, stating merely that he is a stranger to the matters contained in the bill, and that he hopes the interest of the Crown will be taken care of (p). In cases, however, in which the interest of the Crown, or the purposes of public justice require it, a full answer will be put in (q), as in Craufurd v. The Attorney-general (r), in which case the Lords of the Treasury had directed that the question might be brought before the consideration of a Court of justice, and it would therefore have been unbecoming in the Attorney-general to urge any matter of form which might prevent the case being properly submitted to the Court, before whom it was brought (s).

In Errington v. The Attorney-general (t), the Attorney-general being one of the defendants to a bill of interpleader, put in the usual general answer, upon which the other defendents moved that the bill might be dismissed, and the injunction dissolved; the Attorney-general opposed the motion, and at the same time prayed that he might be at liberty to withdraw his general answer, and put in another, insisting upon the particular right of the Crown to the money in question, which was granted.

(m) Corporation of the Sons of the Clergy v. Mose, 9 Sim. 610.

(n) Anon. 3 Atk. 277.

(q) Colebrooke v. Attorney-general, 7 Price, 192.
(r) 7 Price, 1.

⁽o) Davison v. Attorney-general, 5 Price, 398, n.
(p) 1 Newl. 103.

⁽s) Vide etiam Dean v. Attorneygeneral, ubi supra.
(t) Bunb. 303.

The answer of the Attorney-general is put in without oath, and In what cases is usually signed by him. And it seems that such an answer is not liable to be excepted to, even though it be to a cross bill, filed by the defendant in an information for the purpose of obtaining a discovery of matters alleged to be material to his defence to the information. We have, however, seen before (u), that where a cross bill is filed against the Attorney-general, praying relief as well as a discovery, he cannot protect himself from answering by means of demurrer (x): but whether he could by such means protect himself from answering a mere bill of discovery, does not appear to have been decided; it is most probable that he might, and that the Court would in such a case if a discovery were wanted from the Crown, put the party to prefer his petition of right (y).

Defendant.

The right of the Attorney-general to receive his costs, where he His right to is made a defendant to a suit, has been before noticed (z); it will costs. suffice therefore here to repeat, that there seems to be no rule against the Attorney-general receiving his costs, where he is made a defendant in respect to legacies given to charities; and that in Moggridge v. Thackwell (a), costs were given to all parties, including the Attorney-general, as between solicitor and client, out of the fund in Court. It appears also that he frequently receives his costs where he was made a defendant in respect of the immediate rights of the Crown, in cases of intestacy (b).

During the vacancy of the office of Attorney-general, the Solic-Solicitor-geneitor-general may be made a defendant to support the interests of ral. the Crown (c); and it has happened, that where there has been an information by the Attorney-general, the object of which has been to set up a general claim on behalf of the Crown at variance with the interests of a public charity, the Solicitor-general has been made a defendant, for the purpose of supporting the interests of such charity against the general claim of the Attorney-general. The means of compelling the appearance or answer of the Attorneygeneral will be found in the subsequent Chapters upon Process.

(u) Supra. (z) Dean v. Attorney-general, 1 Y.

& C. Exchr. Reports, 209.

(y) Dean v. Attorney-general, 1 Y. & C. Ezchr. Reports, 209.

(2) Ante. (a) 7 Ves. 88.

(b) Attorney-general v. Earl of Ashburnham, 1 S. & S. 397.

(c) Lord Red. 81.

### SECTION III.

# The Attorney-general to the Queen-consort, and Prince of Wales.

THE Queen-consort must be sued by her Attorney or Solicitorgeneral, in the same manner as a King or Queen regnant; and it is presumed, that the Prince of Wales, as Duke of Cornwall, has the same prerogative, although no cases appear in the books, wherein that point has been decided or discussed.

### SECTION IV.

# Governments of Foreign States and Ambassadors.

May sue.

It has been before stated, that the Sovereign of a foreign country recognized by this government, may sue either at Law or in Equity, in respect of matters not partaking of a political character (d): and his liability to be sued in a case where he himself was plaintiff, has been established upon the principle, that by suing here, he had submitted himself to the jurisdiction of the Court in which he sued (e). A cross bill, may therefore, be filed against him, and he is bound to answer upon oath.

Cross bill may

The question whether a foreign Sovereign, who has not submitbe filed against ted to the jurisdiction, can be sued in the Courts of this country, has been raised in the recent case of the Duke of Brunswick v. The King of Hanover (f). It was an important feature in this case, that the defendant as a subject of this kingdom, had renewed his allegiance after his accession to the throne of Hanover, and exercised the rights of an English peer. The general object of the suit was to obtain an account of property belonging to the plaintiff, alleged to have been possessed by the defendant, under color of an instrument creating a species of guardianship, unknown to the law of England. None of the acts complained of took place in this country, or were done by the defendant before he became King of Hanover. Moreover, though it was not necessary to decide the question, the Court seemed to consider that they were of a political character.

⁽d) Page 21, [22, and note.]
(e) Hullett v. King of Spain, 2 Bligh, N. S. 47. (f) 6 Beav. 1.

may be De-

fendants.

The defendant demurred to the bill, and in giving judgment upon In what cases the demurrer, Lord Langdale, M. R., elaborately reviewed all the authorities and arguments upon the subject; and came to the conclusion. that "His Majesty the King of Hanover is, and ought to be, exempt from all liability of being sued in the Courts of this country, for any acts done by him as King of Hanover, or in his character of sovereign prince; but that being a subject of the Queen, he is and ought to be liable to be sued in the Courts of this country, in respect to any acts and transactions done by him, or in which he may have been engaged as such subject. respect of any act done out of this realm, or any act, as to which it may be doubtful whether it ought to be attributed to the character of Sovereign, or to the character of subject, that it ought to be presumed to be attributable rather to the character of Sovereign, than to the character of subject." Accordingly, it not appearing that the alleged acts and transactions of the defendant, were of such a description as could render him liable to be sued in this country, the demurrer was allowed.

It further appears from the last-mentioned case, that as a sovereign prince is prima facie entitled to special immunities, it ought to appear on the bill, that the case is not one to which such special immunities extend.

There have moreover been cases, in which the Court being called upon to distribute a fund in which some foreign Sovereign or State may have had an interest, it has been thought expedient and proper to make such Sovereign or state a party. The effect has been to make the suit perfect as to parties, but as to the Sovereign made a defendant, the effect has not been to compel, or attempt to compel, him to come in and submit to judgment in the ordinary course, but to give him an opportunity to come in and claim his right, or establish his interests in the subject-matter of the suit (g).

With regard to Ambassadors, by stat. 7 Ann. c. 12, all writs and Ambassadors. process sued forth and prosecuted, whereby the person of any Ambassador, authorized and received as such by her Majesty, may be arrested and imprisoned, or his goods distrained, seized or attached, shall be deemed to be utterly null and void. This act professes to be, and has frequently been adjudged to be declaratory (h), and in confirmation of the Common Law; and, as Lord Tenterden said, "it must be construed according to the Common Law, of which the law of nations must be deemed a part." The 5th secCorporations Aggregate.

Where subjects of sovereign to whom accredited. tion of the Act excepts the case of a bankrupt in the service of any Ambassador.

Cases have frequently occurred, in which an Ambassador has himself been a subject of the Sovereign, to whom he was accredited, and, notwithstanding some difference of opinion, it seems to be considered that such an Ambassador would not enjoy a perfect immunity from legal process, but would enjoy an immunity extending only to such things as are connected with his office and ministry, and not to transactions and matters wholly distinct and independent of his office and its duties (i) (1).

#### SECTION V.

# Corporations.

Sued by corporate name.

It has been stated before (k) that corporations aggregate must be sued by their corporate name; that is, if they are corporations existing by Royal charter, they must be sued by their name of foundation, though it has been said that if a corporation be known by a particular name, that it is sufficient to sue it by that name (l). This however, must be confined to the case of a corporation by prescription; for it is said that if a corporation is created by the Queen, and the commencement of it appear by the record, it can have no other name by use, nor be named otherwise than the Queen by her letters patent has appointed, and the Court will not permit it to be sued by any other name (2).

Not sued without the head. Individual members not parties unless for compelling a discovery.

A corporation aggregate which has a head, cannot be sued without it, because without its head it is incomplete (m). It is not however necessary to mention the name of the head (n); nor is it in general proper to make individual members of aggregate corporations parties by their proper Christian and surnames, though cases may occur where this will be permitted for the purpose of compelling a discovery from them of some fact which may rest in

⁽i) 6 Beav. 52. (k) Ante, p. 22.

⁽l) Bro. Corp. 40.

⁽m) 2 Bac. Ab, tit. Corp. [E.] e; pl. 2.

⁽n) 3 Salk. 103; 1 Leon. 307.

⁽¹⁾ As to the rights and exemptions of Ambassadors, see 1 Kent, (5th ed.) 38, et seq. 182.

⁽²⁾ A corporation can only be called upon to answer by its corporate name. Binney's case, 2 Bland. 99.

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Thus in the case put by Lord Eldon, in their own knowledge. Dummer v. The Corporation of Chippenham (o), of an individual corporator whose estate was charged with a rent or payment to a charitable institution, of which the corporation had the management, and who had obtained possession of the deed. his Lordship was of opinion that upon an information for the purpose of having the estate of the charity properly administered by the corporation, it would be perfectly competent to call upon the mayor, if he was the individual implicated in that conduct, not only to answer with the rest under their common seal, but also to answer as to the circumstances relative to the deed supposed to be in his hands. also in the principal case, which was that of a bill by a schoolmaster against a corporation (p) who were trustees of a charity, to be relieved against a resolution of the trustees by which he was deprived of his office of schoolmaster, on the ground that the resolution had been pronounced by five of the members of the corporation, from improper motives with reference to a parliamentary election, to which bill the five members were made parties, for the purpose of obtaining from them an answer upon oath as to their alleged improper conduct, a demurrer which had been put in by these five members, on the ground that no title was shown to the discovery against them, was overruled by Lord Eldon.

And in the case of the Attorney-general v. Wilson (q), a corporate body suing both as plaintiff and relator, sustained a suit against five persons formerly members of the corporation, in respect of unauthorized acts done by them in the name of the corporation.

The practice of making the officers or servants of a corporation Officers of corparties to a suit for the purpose of eliciting from them a discovery porations made parties for the upon oath of the matters charged in the bill, has been too fre-purpose of disquently acted upon and acknowledged, to be now a matter of covery; The first case which occurs upon the point is an anonymous one, in 1 Vernon (r), where a bill having been filed against a corporation to discover writings, and the defendants answering under their common seal, and not being sworn, would answer nothing to their prejudice, it was ordered that the clerk of the company, and such principal members as the plaintiff should think fit, should answer on oath, and that the Master should settle the

⁽o) 14 Ves. 255. Dummer v. The Corporation (p) Dumme. .. ___ of Chippenham, ubi supra.

⁽q) Cr. & Ph. (1). (r) Page 117; and see Wych v. Meal, 3 P. Wms. 310.

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oath. In the case of Glascott v. Copper Miners' Company (s), the plaintiff was sued at Law by a body corporate, and filed his bill for discovery only, making the governor, deputy-chairman, one of the directors, and the secretary of the company, co-defendants with the company. It was objected upon demurrer to the bill, that an officer of a corporation could not be made a co-defendant to a bill which sought for discovery only, or at any rate that individual members could not be joined as defendants with the corporation at large. The demurrer was, however, overruled by the V. C. of England (1).

But not if mere witnesses. It may be observed here, that where the officer of the corporation from whom the discovery is sought is a mere witness, and the facts he is required to discover are merely such as might be proved by him on his examination, he ought not to be made a party. Thus, where an officer of the Bank of England was made a party, for the purpose of obtaining from him a discovery as to the times when the stock in question in the cause had been transferred, and he demurred to the bill, Sir J. Leach, V. C., allowed the demurrer, on the ground that the officer was in that case merely a witness (t) (2).

(s) 11 Sim. 305; see also the case of Moodaley v. Morton, 1 Bro. C. C. 469, [Perkins's ed. notes.] It should be observed here, that Lord Eldon, in Dummer v. The Corporation of Chippenham, ubi supra, mentioned it as his opinion, that the case of Steward v. The East India Company, 2 Vern. 380, in which a demurrer to a bill against the company and one of its servants, is reported to have been allowed, is a misprint; and that instead of stating that the demurrer was allowed without putting them to answer as to matter of fraud and contrivance, which is nonsense, it should

have been, that the demurrer was disallowed, with liberty to insist by their answer that they should not be compelled to answer the charges of fraud, &c.; but it may not have been that the bill, which was against arbitrators as well as the servants of the company, and who all joined in demurring, contained an allegation of fraud and contrivance, and that one of the questions argued had been whether, although they had demurred to the bill, they ought not to have supported their demurrer by an answer denying the allegations?

(t) How v. Best, 5 Mad. 19.

(2) A mere witness ought not to be made a party to a bill, although the plaintiff may deem his answer more satisfactory than his examination. Story Eq. Pl. § 234, § 519, and note; 2 Story Eq. Jur. § 1499; Wigram, Discovery,

⁽¹⁾ Officers and members of a corporation may be made parties to a bill so far as the bill seeks for discovery, though they have no individual interest in the suit, and no relief can be had against them. Wright v. Dame, I Metcalf, 237; Story Eq. Pl. § 235; 2 Story Eq. Jur. § 1500, § 1501; Cartwright v. Hateley, 1 Sumner's Vesey, 293, note (1); Hare, 83; Le Texier v. Margrave and Margravine of Anspach, 5 Vesey, 322; Fenton v. Hughes, 7 Sumner's Vesey, 287, Perkins's note (a); Westchester Co. Manuf. Co. 1 John. Ch. 366; Vermilyes v. Fulton Bank, 1 Paige, 37; Walker v. Hallett, 1 Alabama, (N. S.) 379; Beckman Ins. Co. 9 Paige, 188.

(2) A mere witness ought not to be made a narty to a bill, although the

But although it is not an unusual practice to make the clerk or Corporations other principal officer of a corporation a party to a suit against such corporation, for the purpose of eliciting from him a discov-bound to make ery of entries or orders in the books of the corporation, yet where full answer; such is not the case, it is still the duty of the corporation, when purpose to informed by the information of the nature and extent of the claims cause their made upon them, to cause diligent examination to be made before and books to they put in their answer, of all deeds, papers and muniments in be searched; their possession or power, and to give in their answer all the information derived from such examination; and it was said by Sir J. Leach, M. R., that if a corporation pursue an opposite course, and in their answer allege their ignorance upon the subject, and the information required is afterwards obtained from the documents scheduled to their answer, the Court will infer a disposition on the part of the corporation to obstruct and defeat the course of justice, and on that ground will charge them with the costs of the suit (u).

Where a suit is instituted against a corporation sole, he must Answer under appear and defend, and be proceeded against in the same man-common seal. ner as if he were a private individual. But where corporations aggregate are sued in their corporate capacity, they must appear by attorney, and answer under the common seal of the corporation (1); but if those of which the corporation consists be charged as private individuals, they must answer upon oath.

If the majority of the members of a corporation are ready to Method of proput in their answer, and the head or other person who has the cus-the head or tody of the common seal refuses to affix it, application must be person having made to the Court of Queen's Bench for a mandamus to compel the common seal refuses to him, and in the mean time the Court of Chancery will stay the affix it. process against the corporation (x).

The process for compelling the appearance and answer of a corporation, will be found in the future Chapters under those heads.

(z) Attorney-general v. The Burgesses of East Retford, 2 Mylne & 2 Bac. Ab. tit. Corp. 13. K. 35. (z) Rex v. Wyndham, Cowp. 377;

⁽Am. ed.) p. 165, § 235; Hare, 65, 68, 73, 76; Newman v. Godfrey, 2 Bro. C. C. (Perkins's ed.) 332. See Wright v. Dame, 1 Metcalf, 237; Post v. Boardman, 10 Paige, 580; Norton v. Woods, 5 Paige, 251.

(1) See Fulton Bank v. New York and Sharon Canal Co. 1 Paige, 311;

Vermilyea v. Fulton Bank, 1 Paige, 37.

The answer of a corporation should be signed by the President. It is usual for the secretary or cashier to sign it also. 1 Barbour Ch. Pr. 156.

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Act 1 Vic. c.
73, s. 3.

It should be stated here, that by the Act 1 Vict. c. 73, s. 3, her Majesty is empowered to grant letters patent, providing that suits against a company shall be carried on in the name of one of the officers of the company appointed for that purpose. And by sect. 4 it is enacted, that it shall and may be lawful, in and by such letters patent so to be granted to any such body or company as aforesaid, to declare and provide that the members of such company or body so associated as aforesaid, shall be individually liable in their persons and property for the debts, contracts, engagements and liabilities of such company or body, to such extent only per share as shall be declared and limited in and by such letters patent; and the members of such company or body shall accordingly be individually liable for such debts, contracts, engagements and liabilities respectively, to such extent only per share as in such letters patent shall be declared and limited, such liability nevertheless to be enforced in such manner and subject to such provisions as are hereinafter contained.

It will be recollected, that amongst the privileges conferred upon companies, by the 7 & 8 Vict. c. 110, s. 25, was that of suing and being sued by their registered name, in respect of any claim by or upon the company, upon or by any person, whether a member of the company or not, so long as any such claim may remain unsatisfied.

7 & 8 Vic. c.

By a recent Act of Parliament, passed for the purpose of facilitating the winding up the affairs of Joint-Stock Companies, unable to meet their pecuniary engagements, by sect. 20 the Court authorized to act in the prosecution of any fiat in bankruptcy therein mentioned, may direct the creditors, assignees of the estate and effects of any company or body therein mentioned, to apply to the High Court of Chancery, by petition in a summary way to the Lord Chancellor, or Master of the Rolls, praying that all such orders and directions may be given, as may be necessary for the final winding up and settling the affairs of such company or body, and to compel a just contribution from all the members of such company or body, towards the full payment of all the debts and liabilities of such company or body, and of the costs of winding up and finally settling the affairs of such company or body; and that upon the hearing of such petition, the Court of Chancery may refer it to one of the Masters to take all such accounts, and make all such inquiries as shall be required, for the purpose of ascertaining what sum of money in the whole, and what sums of money as proportionate parts of the whole, or what sum or sums of money from time to time, on account, will (having regard to

the deed of settlement of such company, and the calls, contribu- Corporations tions, debts or demands, actually paid by the several and respective members thereof, and also having regard to any proceedings in the Court of Bankruptcy, or any district Court of Bankruptcy.) be necessary and proper to be raised by calls or contributions from the respective members of such company or body, for the payment and satisfaction of all the debts and liabilities of such company or body, and also of all the costs of winding up and settling the affairs of the said company; and that the High Court of Chancery, upon confirmation of the Master's report made upon any such reference, or upon making such reference, or otherwise, may order the payment of the several and respective sums of money, which by such report are found necessary and proper to be paid, and may refer it to the Master to appoint a receiver to receive and collect such sums of money, and either to pay the same into the Bank of England, in the name and to the credit of the account of the Accountant-general of the High Court of Chancery, to the credit of such company or body; and may, upon the petition of such assignees, order such sums of money to be paid in or towards satisfaction of the debts, which by the proceedings in bankruptcy, shall have been found to be due to the creditors of such company or body, and all persons having claims and demands thereon, and also in satisfaction of costs; and may order such receiver to pay such sums of money, in satisfaction of such debts, claims and demands, and costs in the first instance.

And by sect. 21 of the same Act it is enacted, that if it shall appear that any individual members of such company or body have claims against each other, in respect of the affairs or transactions of such company or body, it shall be lawful for the Court of Chancery, upon the petition of any member of such company or body alleging that he hath any such claim against any other member of such company or body, to make all such orders as, shall be just for the purpose of finally settling and determining such claim, and may order the payment of such sum of money (if any) as shall appear to be due in respect of any such claim.

By the 22d sect. the Lord Chancellor is empowered, with the advice and consent of the Master of Rolls and Vice Chancellors, to make rules and orders as to the form and mode of proceeding for settling and enforcing contribution to be made by members of the company, and the practice to be observed by the Court of Chancery and the Masters in such proceedings. No cases have as yet occurred upon this Act, nor has it hitherto been found necessary to issue any orders upon this subject.

Bank of England, &c.

With respect to proceedings against Joint Stock Companies existing under private Acts of Parliament, they must depend entirely upon the provisions of the Act under which they are constituted; nothing can therefore be added in this place, beyond calling the reader's attention to the observation of Lord Eldon upon these companies, in his judgment in Van Sandau v. Moore (y), which has been before noticed, and to the observations already made in treating of suits instituted on behalf of this description of associations (z).

In pursuance of the arrangement suggested in the commencement of this Chapter, the reader's attention will be here called to certain peculiarities consequent upon making particular corporations parties to a suit, who, although they have no interest in the subject-matter, are nevertheless sometimes brought before the Court in respect of their situation as managers of certain public stocks, the management of which has been entrusted to them by These corporations are the Bank different Acts of Parliament. of England, the East India Company, and the South Sea Company.

May be parrestrain transfer of stock or payment of dividends.

The Governor and Company of the Bank of England, the Unities to a suit to ted Company of Merchants trading to the East Indies, and the Governor and Company of Merchants of England trading to the South Seas or other parts of America, may be made parties to a suit relating to any public stock standing in their books, for the purpose of compelling or authorizing such companies to suffer a transfer of such stock to be made in their books, and also of praying an injunction against their permitting such transfer; and formerly it appears to have been the practice to make them parties in all cases of that description, and an opinion stated to have been expressed by Lord Kenyon, that notice to the Bank without more would operate as an injunction, was denied by Lord Eldon in Temple v. The Bank of England (a), who observed, that the Bank would never admit that, even upon a subpæna and bill filed.

By 40 Geo. compellable to suffer a transfer of stock or payment of dividends;

In order to save the expense of making these companies parties, III c.36, Bank an Act of Parliament was passed, 40 Geo. III. c. 36, which enables any of her Majesty's Courts of Equity, before or upon hearing any cause depending therein, to order the Governor and Company of the Bank of England to suffer a transfer of stock standing in their books to be made, or to pay any accrued or accruing div-

⁽y) 1 Russell, 441–458.(z) Ante, p. 30.

⁽a) 6 Ves. 770, 772.

idends thereon, belonging to or standing in the names of any Bank of Engparty to a suit, as such Courts may deem just, or to issue an injunction to restrain them from suffering any transfer of such stock, or may be reor from paying any dividends or interest accruing or accrued strained by inthereon, although such Governor and Company are not parties to though not the suit in which such decree or order shall be made, such Courts party to a suit. being satisfied by the certificate of the accountant of the said corporation, duly signed by him as thereinafter is directed, that the stock required to be transferred is standing in their books in the names of the persons or person required to transfer the same, or of the persons or person to whom they or he are or is the legal representative; and that after due service of a short order upon the said Governor and Company, or their proper officer, like process shall issue to enforce such order or decree as to enforce them against any party to a suit depending in such Court. And for the better enabling any party to a suit to obtain and produce such certificate in Court, upon request in writing, signed by the clerk in court (or other officer answering thereto), and the solicitor concerned in the cause for the party applying, which shall state the cause, and for what parties they are concerned, the Governor and Company of the Bank of England shall deliver or cause to be de- 40 Geo. III. c. livered to the said clerk in court or other officer, and solicitor, or one of them, a certificate signed by their accountant, stating the amount of such stock or dividends, and in whose names or name such stock is standing in their books, and if it be particularly required (but not otherwise), when such stock or any part thereof was transferred, and by whom; it is provided nevertheless, that nothing therein contained shall extend to any case where any further discovery is wanted than is thereinbefore expressly mentioned, nor to any case where the said Governor and Company claim any interest in or lien upon the said fund, but that in such cases it shall be necessary to make them a party to such suit, as if the Act had never been made; and that if any special matter shall arise which in the opinion of the said Governor and Company shall affect their interests, or which may be objected against suffering such transfer of stock, &c., it shall be lawful for them to state such matter to the Court, by motion or petition in such suit, and that execution of process to compel such transfer, &c., shall be suspended until final order shall be made thereon.

By the third section it is enacted, that in all suits then depending in which the said Governor and Company may have put in their answer, not claiming any interest in or lien upon the stock

Bank of England, &c. required to be transferred, no further proceedings shall be had against them as a party to suits, but that the bills shall stand dismissed as against them in such suits; and that in all such suits an order may be made, upon motion or petition as of course, for the taxing of their costs already incurred, and for immediate payment thereof by the plaintiffs in any such suits or any of them, subject however to any further order as between the other parties to such suits respecting the final payment of such costs, as by the Court in which any suit may be depending shall be deemed just. And by the fourth section, all the several regulations and provisions thereinbefore enacted extend, mutatis mutandis, to every case where the United Company of Merchants of England trading to the East Indies, or the Governor and Company of Merchants of Great Britain trading to the South Seas or other parts of America, have any stock standing in the books of such respective corporations which may now be or hereafter may become the subject of any suit in Equity or incidental thereto, saving to the said corporations respectively the like right of being made a party, by applying by motion or petition in such suits, as is before reserved or given to the Governor and Company of the Bank of

May still be made parties;

but if made so unnecessarily, bill will be dismissed with costs.

By a singular mistake in penning the third section of the above Act, the latter words of the section are not prospective, only extending to causes then depending; the consequence is, that the above-mentioned public bodies may still, if the plaintiff thinks proper, be made parties to a suit, and demurrers by them will be overruled (b). Some check, however, is provided for an abuse of this power, by a declaration of Sir John Leach, V. C., that where the Bank has been unnecessarily made a party, the bill will be dismissed as against it, with costs to be personally paid by the plaintiss (c). And in the case of Perkins v. Bradley (d), where the Bank of England was made a party for the purpose of rendering it subject to an order for the transfer of stock; Sir J. Wigram, V. C., said (d), "that the Bank of England was not a necessary party, and therefore the costs of the Bank must be borne by the plaintiff. Nothing can be more comprehensive in its terms than the Act (e), which was passed for the purpose of relieving both the Bank and the suitor from the necessity of the Bank being

⁽b) Temple v. Bank of England, 6 Ves. 770; Attorney-general v. Gale, ib. n. (d) 1 Hare, 232. (e) 39 & 40 Geo. III. c. 36.

⁽c) Edridge v. Edridge, 3 Mad. 386;

brought before the Court." Where, however, the Bank was Bank of Engnecessarily made a party for the security of a legacy, its costs were erdered to be paid out of the capital of the legacy (f).

Although it is stated above that the opinions expressed by Lord Effect of no-Kenyon, that notice to the Bank, without more, would operate as tice upon the Bank. an injunction to restrain them from permitting the transfer of stock, was denied by Lord Eldon, yet it seems that where the Bank has been made a party to a suit, praying an injunction to restrain them from permitting a transfer or payment of dividends, a notice served upon them, stating that a bill had been filed, and what the object was, accompanied by a subpæna, will have the effect of an injunction to restrain the transfer (g); and that in such case if the plaintiff in the cause does not move for an injunction in proper time, the other defendants, in whose names the stock stands, may apply to the Court to permit the Bank to make a transfer, which it will order to be done after a certain day, unless in the mean time the Court shall grant an injunction to restrain such transfer (h). It seems, however, that an application to this effect cannot be made on behalf of the Bank; and if the Bank apply at all for protection in a case, where money in the public funds is the subject of dispute between two parties, it must be in the shape of plaintiffs to a bill of interpleader (g).

It is to be observed here, that the Bank of England is not bound Not bound to to take notice of any trust affecting public stock standing in their notice a trust of public stock books; all they have to do is to look to the legal estate; and therefore, if the person entitled to the legal estate applies for a transfer to himself, the Bank must permit the transfer, and are not bound to look further to see whether the stock is trust stock. ground, where a bill was filed against the Bank, to compel them to make good the deficiency in a sum of stock which had been specifically bequeathed to a trustee, who was also the executor, and which had been transferred to the trustee and executor, and afterwards sold out by him, it was dismissed as against the Bank (h). Upon the same principle, where the Bank filed a bill against the executors of a will, to restrain their proceeding in an action

⁽f) Hammond v. Neame, 1 Swan. 35.

 ⁽g) Ross v. Shearer, 5 Mad. 458.
 (h) Ibid.

g) Birch v. Corbyn, 1 Cox, 144. With respect to the right of the Bank of England to apply to a Court of Equity to restrain any action brought against it by an executor or other per-

son having a *legal* right to call for a transfer of funds, vide Bank of England v. Lunn, 15 Ves. 569, and the cases there cited; and see the case of Crayshaw v. Thornton, 2 M. & C. 1, as to the general jurisdiction in cases of Interpleader.

⁽h) Hartga v. Bank of England, 3 Ves. 55.

land, &c.

Bank of Eng- brought by them against the Bank, in consequence of their refusal to permit a transfer to the executors of stock, part of the testator's residuary estate, which had been bequeathed to them upon certain trusts, the injunction was dissolved, on the ground that the Bank had a good defence at law (i).

Effect of a specific bequest of stock.

It is to be observed, however, that by the 6 Geo. I. st. 2, c. 19, s. 90, by which the management of the public stocks or annuities was first given to the Governor and Company of the Bank of England, the stock created by that Act was declared to be personal estate; and by the 12th section of the same Act it was provided, that any person possessed of such stock or annuities might devise the same by will in writing, attested by two or more credible witnesses; but that such devisee shall receive no payment thereupon till so much of the will as relates to the stock or annuity be entered in the proper office at the Bank; and that in default of such transfer or devise, the stock or annuities were to go to the executors or administrators. These clauses have been repeated in all subsequent Acts creating stocks of this nature, and have given rise to considerable discussion, as to whether the Bank are bound to take notice of a specific devise of stock, attested by two witnesses, and registered according to the provisions of the Acts, and whether they are justified in resisting a claim to such stock set up by the executor. This appears to have been first discussed in the case of Pearson v. The Bank of England (k), in which a sum of stock had been bequeathed to the plaintiff, who was also executor of the will, for life, and after his decease to Mr. White absolutely, who afterwards, for a valuable consideration, by deed, bargained and sold all his interest in the stock to the plaintiff. bequest had been duly registered according to the Act, and on application made to the Bank by the plaintiff and White to transfer the stock to the plaintiff, they refused, and the bill was filed by the plaintiff and White against the Bank, to compel them to make the transfer; it also prayed that the Bank might pay the costs of the suit. It was insisted on the part of the Bank, that unless by transfer inter vivos, or by devise by will properly attested, stocks were not properly assignable; that it could not be expected that the Bank would take upon itself the hazard of determining the consequences of private transactions between parties interested in the fund; and that if those parties dealt with their stock in any

⁽i) Bank of England v. Moffat, 3 5 Ves. 665. Bro. C. C. 260; 5 Ves. 668, and note; (k) 2 Br Dre. C. C. 250; 5 Ves. 668, and note; (k) 2 Bro. C. C. 529; 2 Cox, 175, and see Bank of England v. Parsons, S. C.

other manner than that prescribed by the Acts of Parliament, the Bank of Eng-Bank could act only under the decrees of Courts of competent jurisdiction. Upon hearing the case, Lord Thurlow was of opinion, that the devise of the stock was, under the Acts in question, in the nature of a Parliamentary appointment (1), and did not want the assent of the executor, and that being so, the practice of the Bank seemed strictly right, and he accordingly gave them their The same rule was subsequently followed by Lord Loughborough in Maryatt v. The Bank of England, and in Aynsworth v. The Bank of England (m), and also by Sir W. Grant, M. R., in Austin v. The Bank of England (n). Where, however, a bill had been filed by the Bank, to restrain an action brought by the executor, in consequence of their refusal to permit the transfer of stock specifically bequeathed, Lord Eldon allowed a demurrer to the hill, on the ground that that there was no foundation for the interference of the Court, for if the executor could not maintain an action, the plaintiffs did not want protection, and if he could maintain an action, then the true construction of the Act authorized or did not prevent that action, and if so, there was no equity (0). There are certain means provided by statute by which, upon summary applications, orders may be obtained restraining, for a limited period, the transfer of stock or the payment of dividends. For the practice on those points, the reader is referred to the Chapter on Injunctions in the second volume.

#### SECTION VI.

## Married Women.

Ir is a rule, both of Law and of Equity, that where a suit is in- Cannot defend stituted against a married woman, her husband must also be a par-without their husbands; ty (1), unless he is an exile or has abjured the realm (p), in which unless exiles. case the wife is considered in all respects as a feme sole (q), and or alien enemay be made a defendant without her husband being joined (r) mies.

(l) Cox, 179. (m) 8 Ves. 524, n. b. (a) 8 Ves. 522.	(p) Lord Red. 23. (q) Countess of Portland v. Prodgers, 2 Vern. 104.
(e) Bank of England v. Lunn, 15 Ves. 581.	(r) 1 Inst. 132 b, 133 a.

⁽¹⁾ See 2 Story Eq. Jur. § 1368; Story Eq. Pl. § 71.

Of separate Process against. May be defendants for their separate property;

but not to discover husband's estate.

Wife may be proceeded against alone;

where her separate property concerned;

if husband abroad

(1); which it seems she also may if her husband is an alien enemy (s) (2). It appears also, that in certain cases a husband may, in equity, make his wife a defendant (t) (3), as where she has before marriage entered into articles concerning her own estate, she is considered to have made herself a separate person from her husband, and in such a case, upon a motion by the husband to commit her for not answering interrogatories, she was ordered to answer within a week, &c. (u). A husband, however, cannot make his wife a defendant in order to have from her a discovery of his own estate (x).

But although a wife cannot, except in certain instances which have been pointed out, be made a defendant to a suit without her husband being joined as a co-defendant, yet there are cases in which, although the husband and wife are both named as defendants, the suit may be proceeded with against the wife separately. Thus, if the suit relates to the wife's separate property, and the husband be beyond the seas and is not amenable to the process of the Court, the wife may be served with a subpæna and compelled to answer the bill (4). In Dubois v. Hole (v), a bill was filed against a man and his wife for a demand out of the separate estate of the wife, and the husband being abroad the wife was served with a subpæna, and upon non-appearance was arrested upon an attachment, and having stood out all the usual process of contempt, the bill was taken pro confesso against her (z). It is to be observed, that in order to entitle the plaintiff to compel the wife to answer separately, the husband must be actually out of the jurisdiction, and that the mere circumstance of his being a prisoner in the Queen's Bench prison, will not be a sufficient ground for obtaining an order for a separate answer (a) (5).

(s) Deerley v. Duchess of Mazarine, Salk. 116.

(y) 2 Vern. 613.

z) 2 Vern. 614, in notis; vide etiam (t) Brooks v. Brooks, Prec. Ch. 24. Bell v. Hyde, Prec. Ch. 328, and the (u) Ibid. other cases there cited.

(z) Ibid.

(a) Anon. 2 Ves. J. 332.

(2) 2 Kent, (5th ed.) 155; Story Eq. Pl. § 71.
(3) Story Eq. Pl. § 71; 2 Story Eq. Jur. § 1368.
(4) Story Eq. Pl. § 71.

The plaintiff may stipulate to receive the joint answer, sworn to by the husband alone. Leavitt v. Cruger, 1 Paige, 422; New York Chem. Co. v. Flowers, et ux. 6 Paige, 654.

⁽¹⁾ See ante, 110, notes and cases cited; 2 Kent, (5th ed.) 154, 155; Robinson v. Reynolds, 1 Aiken, 174; Bean v. Morgan, 1 Hill, Ch. 8; Story Eq. Pl. § 71.

⁽⁵⁾ If the wife be absent, the husband may obtain time to issue a commission to obtain the wife's oath to the answer; and if she refuse to answer, the bill may be taken pro confesso against her. Leavitt v. Cruger, 1 Paige, 422. See Halst. Dig. 170-174.

The case in which the Court compels a woman to appear and defend separately from her husband, is where the demand is against her in respect of her separate estate, and the husband is only named for conformity, and cannot be affected by the decree; but where no separate property, where there is no separate property belonging to the wife, she can-wife cannot be not be proceeded against without her husband, unless indeed she has proceeded appeared and prayed permission to answer separately, in which out husband: case she will be liable to the usual process of contempt if she does unless she apnot put in her answer in conformity with the order which she herself has obtained (b) (1).

Of separate Process against.

It is to be observed here, that a feme covert administratrix is not considered as having a separate property in the assets of her intes- Ne exeat not tate (c), and upon this ground Lord Eldon, in Pannell v. Tayler (d), granted against a fonce held, that a writ of ne exect regno against a married woman sus-covert administaining that character, could not be maintained. In that case his tratrix; Lordship had originally granted the writ, upon the authority of Moore v. Meynell (e) and Jernegan v. Glasse (f), but upon a motion being subsequently made on behalf of the defendant to semble, that discharge the writ, his Lordship was of opinion that it could not separate propbe maintained, observing, that if he had been apprised of the cir- erty it may. cumstances of the case of Moore v. Meynell (upon the authority of which Lord Hardwicke appears to have acted in Jernegan v. Glasse), he should not have granted the writ.

where she has

The circumstances in Moore v. Meynell, of which Lord Eldon in his judgment stated himself to have been ignorant at the time when he originally granted the writ, appeared by the decree, and were, that the feme covert had a large separate property, and that she had executed bonds, from which it seems to have been contended that she had rendered her separate estate liable to the payment of her debts (g).

It is to be observed, that in Pannell v. Tayler, Lord Eldon remarked, that there might be a very great difference between the case of a married woman who has separate property, and the case of a married woman who is administratrix. As administratrix, his

- Vide infra.
- (d) 1 Turn. & R. 96.
- (e) 1 Dick. 30. (f) 1 Dick. 107; 3 Atk. 409; Amb. 62, and 1 Turn. & R. 97, n. b.
  - (g) In a subsequent case, Moore v.

(b) Powell v. Prentice, Ridg. 258. Hudson, Mad. & Geld. 218, Sir John Leach granted 2 separate writs of ne exeat, one against the man, and the other against his wife, who was an executrix, the plaintiff undertaking not to issue more than one of the write.

⁽¹⁾ Post, 193, ch. 9, § 2, Married Women.

Separate An- Lordship said, she can have no property at all, and has no power to act without her husband. This distinction, however, does not appear to have been attended to in some previous cases, in which. Sir John Leach, V. C., appears to have granted attachments against femes covert administratrix, where their husbands were abroad. The first case was Bunyan v. Mortimer (i), where a bill was filed against a husband and wife in respect of a demand on the wife as executrix of a deceased person, and the husband having gone abroad after appearance for himself and wife, an attachment was issued against him, and a motion was made for leave to issue an attachment against the wife, when his Honor said, that the proper course was, to move that the wife might answer separately, and that notice of that motion must be given to the wife.

Wife compelled to answer separately for her own tortious act.

Where a husband and his wife are living separate from each other, the husband will not be answerable for the tortious act of his wife, and the wife may be compelled to answer apart from her husband; thus in Plomer v. Plomer (k), where the plaintiff being about to pay a debt of 100l. due by him to Lady Plomer, Margaret Smith, her daughter, snatched 20L, part of the money, and went away therewith, and afterwards Lady Plomer brought an action against the plaintiff to recover the 20%; whereupon the plaintiff filed a bill against Lady Plomer and against Margaret Smith and her husband, to recover back from Margaret Smith the 201., and to restrain Lady Plomer's action in the mean time. It was held, that as the defendant, Margaret Smith, lived apart from her husband, and had so done for many years, and would not answer the plaintiff's bill, the Court would not charge the husband with the 201., in regard to their living apart, but that the said Margaret Smith ought to answer the same. And an injunction was accordingly granted against Lady Plomer to restrain her proceeding with the action, until the plaintiff should recover the 201. from Margaret Smith, and in the mean time the plaintiff was ordered to prosecute Margaret Smith with process of contempt for her answer. so where a man's wife lives separate from him and is not under his influence or control, the Court will upon motion, accompanied by an affidavit verifying the circumstances, give the husband leave to der his control; put in a separate answer (1), and process of contempt will then be stayed against him for want of his wife's answer.

Husband not compelled to join in her answer where she is not un-

If a married woman obstinately refuses to join in a defence with obliged to join her husband, the husband may be allowed to defend himself, and

Wife not in husband's defence.

⁽i) Mad. & Geld. 278; and see Bushell v. Bushell, 1 S. & S. 164.

⁽k) 1 Ch. C. 68.(l) Chambers v. Bull, 1 Anst. 269.

the plaintiff must proceed separately against the wife (m) (1); and Separate Ana bill will not lie for the specific performance of a covenant by the husband that his wife shall levy a fine, because upon such a decree the husband could not compel his wife to levy the fine; and if she would not comply, imprisonment would fall upon the husband for the contempt (n). But it is to be observed, that if a wife cannot, in conscience, consent to such an answer as is drawn up by her husband, she is not obliged to submit to it, but upon application to the Court, she may be considered as a separate person, and will be allowed to answer distinctly and independently of her husband; and that if a husband insists that his wife shall put in an answer contrary to what she believes to be the fact, and by menaces prevail upon her to do it, this is an abuse of the process of the Court, and he may be punished for the contempt (o).

The cases in which a woman usually obtains an order to answer In what cases separately from her husband, are those in which she claims an ad-separate inverse interest (p), or where she lives separate from her husband, allowed. or disapproves of the defence he intends to make.

Where a woman, who was made a defendant to a bill filed for Where coverthe purpose of establishing a will against her, with a man who pre- ture denied. tended that he was her husband, but which the woman denied, on her making application to answer separately, Lord Hardwicke ordered, that she should be at liberty to put in a separate answer, but without prejudice to any question as to the validity of the marriage (q).

In general the separate answer of a feme covert ought to have Should have an order to warrant it, and if put in without an order, it may be an order to warrant it. taken off the file (r) (2); but if a husband brings a bill against his wife, he admits her to be a feme sole, and she must put in her answer as such, and no order is necessary to warrant her so do-

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-, 1 C. C. 296;
  (m) Pain a. -
Marriett v. Lyon, Bunb. 17; Pavie
v. A'Court, 1 Dick. 13.
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⁽o) Ex parte Halsam, 2 Atk. 50. (p) Anon. 2 Eq. Ca. Ab. 66.

Wybourn v. Blount, 1 Dick.

⁽n) Astread v. Round, Vin. Ab. tit. Baron and Feme, (H. 6) Ca. 4; 1 Eq. Cas. Ab. 145, Pl. 4, S. C. (r) Prac. Reg. 53.

⁽¹⁾ Story Eq. Pl. § 71; Leavitt v. Cruger, 1 Paige, 421.
(2) An answer of a wife, put in separately, without a previous order, was suppressed, for irregularity. Perine v. Swaine, 1 John. Ch. 24; Leavitt v. Cruger, 1 Paige, 421.

If the wife apprehend, that her husband will not make a proper defence for her, she may, as of course, obtain leave to answer separately. Lingan z. Henderson, 1 Bland. 270. See Anon. 2 Sumner's Vesey, 332, note (a); Ferguson v. Smith, 2 John. Ch. 139.

In what cases order dispensed with.

Separate Aning (s); and if she does not put in her answer, the husband may obtain an order to compel her to do so (t).

But although, strictly speaking, the answer of a fence covert, if separate, ought to be warranted by an order, yet if her answer be put in without such an order, and the same be a fair and honest answer, and deliberately put in with the consent of the husband, and the plaintiff accepts it and replies to it, the Court will not, on the motion of the wife, or of her executors, set it aside. In the Duke of Chandos v. Talbot (u), in which this point was determined, a reference had been made to the Master, to state whether her answer had been regularly put in or not.

Feme covert obtaining order to answer liable to process. Must answer fully;

Must answer fully;
— but need not expose herself to forfeiture;

A married woman, obtaining an order to answer separately from her husband, renders herself liable to process of contempt in case she does not put in her answer pursuant to the order (v).

Where baron and feme are defendants to a bill, it is necessary that the wife, as well as the husband, should put in a full answer (z); she will not, however, be compelled to answer to anything which may expose her to a forfeiture (y); neither is she compellable to discover whether she has a separate estate, unless the bill is so framed as to warrant the Court in making a decree against such separate estate. Thus, where a bill was filed against a man and his wife for the purpose of enforcing the specific performance of an agreement, alleged to have been entered into by an agent on their behalf for the purchase of an estate from the plaintiff; and in support of the plaintiff's case, it was alleged that the wife had separate monies and property of her own, and had joined with her husband in authorizing the agent to enter into the agreement, but the bill prayed merely that the husband and wife might be decreed specifically to perform the agreement, and did not seek any specific relief against her separate estate: the wife, having obtained an order to that effect, put in a separate demurrer as to so much of the bill as required from her a discovery whether she had not separate money and property of her own, &c., and answered the rest. Upon argument, the Master of the Rolls allowed the demurrer, on the ground that as the decree in cases where a feme covert was held liable had been uniformly against the separate estate, and not against the feme covert herself; and that as the bill did not seek

⁽s) Ex parte Strangeways, 3 Atk.

⁽t) Ainslie v. Medlicott, 13 Ves. 266.

⁽u) 2 P. Wms. 371.

⁽v) Powell v. Prentice, Ridgw. P..

⁽z) Wrottesley v. Bendish, 3 P. Wms. 235.
(y) Ibid.

any decree against any trustees, or particular fund, but only against Effect of Anthe wife, it could not be supported, and the interrogatory, if answered, would consequently be of no use (z).

A wife cannot be compelled to make a discovery which may expose her husband to a charge of felony; and if called upon to do charge of so, she may demur (a) (1). The answer of a wife cannot be made felony. use of as evidence to charge her husband, and therefore, where a Her answer bill was exhibited, before the Statute of Frauds, against a husband against him. and his wife to discover a trust, in a matter in which she was concerned as executrix, and they disagreed in their defence, and put in separate answers, the husband denying and the wife admitting the trust; at the hearing, the plaintiff having proved the trust by one witness only, insisted on the wife's confession in her answer; the bill was dismissed, because it was held that the answer of the wife could not bind the husband (b).

For the same reason, a married woman cannot be made a party Feme covert to a suit for the mere purpose of obtaining a discovery from her to not made defendant for the be made use of against her husband, therefore in Le Texier v. The mere purpose Margrave of Anspach (c), where a bill was filed against the Mar- of discovering husband's grave to recover a balance due to the plaintiff upon certain con-vouchers. tracts. to which bill the Margravine was made a party, as the agent of her husband, for the purpose of eliciting from her a discovery of certain vouchers, which were alleged to be in her possession; a Semble, she demurrer by the Margravine was allowed by Lord Loughborough, may if called upon to deliver and afterwards, upon rehearing by Lord Eldon, who said, "that them up. attending to the circumstance that no relief was prayed against the wife, without saying what would be the effect, if there had been a prayer that the vouchers should be delivered up by her; but, observing that she was made a party merely for discovery, which is of no use unless she can be made a witness and the discovery can be used as her testimony against her husband, and a great princi-

⁽z) Francis v. Wigzell, 1 Mad. 258. (a) Cartwright v. Green, 8 Ves. 405.

⁽b) Anon. 2 Cha. Ca. 39.

⁽c) 5 Ves. 322; and 15 Ves. 150.

⁽¹⁾ See Le Texier v. Anspach, 5 Vesey, 322; Story Eq. Pl. § 519. According to the rule laid down in Rex v. Cliviger, 2 Term R. 263, a husband or wife ought not to be permitted to give any evidence, that may tend to criminate each other. This case, however, has been much questioned; and the above rule may be considered as too broadly stated. Rex v. Bathwick, 2 Barn. & Adol. 639; Rex v. All Saints, 6 Maule & Sel. 194; 1 Phil. Ev. (Cowen and Hill's ed. 1839.) 78, 79, 80. In Rex v. Bathwick, ub: su-pra, it is strongly insisted, that the wife may be admitted to prove facts, which might go to show the criminality of the husband, provided her testimony now would not be evidence to affect him in a propagation against him. now would not be evidence to affect him in a prosecution against him.

Effect of An- ple of public policy forbidding that she should be a witness for that purpose, as the bill prays no relief against her, my opinion is, that she is not a proper party to the bill, as a bill for discovery by her as a witness, a character which she cannot sustain against her Upon the same principle, where a bill was filed against a man and his wife for a discovery in aid of an action at Law brought against him to recover a debt due from the wife dum sola, a separate demurrer put in by the wife was allowed (d) (1).

Her answer read against husband.

- where marriage concealed.

In Rutter v. Baldwin (e), the Court agreed clearly, that a wife can never be admitted to answer, or otherwise as evidence, to charge her husband; and that where a man marries a widow executrix, &c., her evidence shall not be allowed to charge her second husband (f), but in that case the wife having held out as feme sole, and treated with the plaintiff and other parties to the cause, who were ignorant of her marriage, in that character, and it having been proved in the cause that on some occasions the husband had given in to the concealment of the marriage; the Court allowed the answer of the wife to be read as evidence against the husband, and decreed accordingly.

But though the separate answer of a married woman cannot be read as evidence against her husband, yet it may be read against herself notwithstanding her coverture. Thus a feme covert, being the heir at law of a testator, and living separate, and answering separately from her husband, in pursuance of an order for that purpose, her admission of the will was held sufficient ground to establish it (g). This appears to have been the case in Le Neve v. Neve (h). In that case, the object of the suit was to set aside a settlement, which had been made by the husband upon his second marriage, of property comprised in a settlement made upon his first marriage, under which the plaintiffs claimed; and the answer

Separate answer of feme covert may be read against herself.

of the second wife appears to have been read for the purpose of

⁽d) Barron v. Grillard, 3 Ves. & B. 165. (g) Codrington v. Earl of Shelburne, 2 Dick. 475. (e) 1 Eq. Ca. Ab. 227. (f) Vide Cole v. Gray, 2 Vern. 79. (h). 3 Atk. 648.

^{(1) 2} Story Eq. Jur. § 1496; Story Eq. Pl. § 519. A mere witness ought not to be made a party to a bill, although the plaintiff may deem his answer more satisfactory than his examination. Story Eq. Pl. § 234, § 519, and note; Newman v. Godfrey, 2 Bro. C. C. (Perkins's ed.) 332; 2 Story Eq. Jur. § 1499; Footman v. Pray, R. M. Charl. 294. This applies to a married woman a fortiori, for she is not compellable to give evidence against her husband in any such case. Story Eq. Pl. § 519; Barron v. Guillard, 3 Ves. & Bea. 165; 2 Story Eq. Jur. § 1496.

showing that the attorney who prepared both settlements was the Effect of Anattorney employed by her, so as to fix her with notice, through him, of the existence of the first settlement. The answer, it is to be observed, could not affect the husband, because he had a life interest under both settlements; and the principal question in the cause was, whether the second wife, at the time her settlement was executed, had notice of the first.

Where a baron and feme are made defendants to a suit, relating Joint answer to personal property belonging to the feme, and they put in a joint wife may be answer, such answer may be read against them, for the purpose of read against fixing them with the admissions contained in it; but where the ters relating to subject-matter relates to the inheritance of the wife, it cannot (i); personal esand the facts relied upon must be proved against them by other tate; but not where suits reevidence: thus, in Merest v. Hodgson (k), the Lord Chief Baron lates to the refused to permit the joint answer of the husband and wife to be wife's inheritance. read, but ordered the cause to stand over, to give the plaintiffs an opportunity of proving the facts admitted.

From the report of the case in Eyton v. Eyton (1), it appears, on Answer of husfirst view, as if the separate answer of a husband had been ad-band cannot be mitted by the Master of the Rolls to be read as evidence against wife. the wife in a matter relating to her inheritance, but upon closer attention, it will be found, that in all probability the reason of the decree in that case was, that his Honor conceived that the counterpart of the settlement, which appears to have been produced, was considered to be sufficient evidence of the settlement; at least, this appears to have been the ground upon which the case was decided on the appeal before the Lord Keeper Wright.

In Ward v. Meath (m) a bill was exhibited against the husband and wife, concerning the wife's inheritance; the husband stood out all the processes of contempt, and upon its being moved that the bill might be taken pro confesso, it was opposed, because the wife having in the interim obtained an order to that effect, put in an Herinherianswer, in which she set forth a title in herself; and the Court de-tance. creed that the bill should be taken pro confesso against the husband only, and that he should account for all the profits of the land which he had received since the coverture, and the profits which should be received during coverture.

⁽i) Evans v. Cogan, 2 P. Wms. 449. (1) Prec. in Ch. 116. (m) 2 Cha. Ca. 173; 1 Eq. Ca. Ab. (k) 9 Price, 563. Vide etiam, El- 65. ston v. Wood. 2 M. & K. 678.

Decree against

It appears, from the report of the above case, to have been admitted, that where the husband does not answer, the answer of a wife in a case relating to her inheritance, is no answer; and that if the husband will not appear, no decree can be had against a feme covert for her inheritance. Some doubt, however, appears to be thrown upon the authority of Ward v. Meath, by the report of Gibson v. Scevington (n), in which the Lord Keeper seems to have refused to allow a bill to be taken pro confesso against a husband, where his wife had appeared and answered; but from a perusal of the report, it appears that the Lord Keeper's decision did not apply to the question of taking the bill pro confesso against the husband, but only to the question whether a decree could be made against the husband upon the answer of his wife, put in without his privity, which his Lordship expressed his intention to decide in the negative: saving that they must proceed against the husband, and levy on the sequestration to bring him in.

No personal decree can be made against a married woman.

It may be observed in this place, that there is no case in which this Court has made a personal decree against a feme covert alone (1). She may pledge her separate property, and make it answerable for her engagements (2); but where her trustees are not made parties to a bill, and no particular fund is sought to be charged, but only a personal decree is prayed for against her, the bill cannot be sustained (o) (3). Upon this ground, in the case before referred to, where a bill was filed against a husband and wife for the specific performance of an agreement for the purchase of an estate, charging that the wife had separate property sufficient to answer the purchase money, but without praying any specific relief against such separate estate, a demurrer put in by the

(n) 1 Vern. 247. 16; Francis v. Wigzell, 1 Mad. 258-(o) Hulme v. Tenant, 1 Bro. C. C. 263.

^{(1) 2} Kent, (5th ed.) 164.

⁽²⁾ See Sperling v. Rochfort, 8 Sumner's Vesey, 175, 182, Perkins's note (a), and cases cited; Fetteplace v. Gorges, 3 Bro. C. C. (Perkins's ed.) 8, 10, and note, and cases cited; 2 Kent, (5th ed.) 164, 165, and notes.

A wife may bestow her separate property, by appointment or otherwise, upon her husband as well as upon a stranger. 2 Story Eq. Jur. § 1336; Methodist Epis. Church v. Jaques, 3 John. Ch. 86-114; Bradish v. Gibbs, 3 John. Ch. 523.

Her separate estate upon her application and consent, given in Court, may be charged with and made liable for his debts. Demarest v. Wyncoop, 3 John. Ch. 144; Field v. Sowle, 4 Russ. 112. She may even become the debtor of her husband for money borrowed of him to improve her separate estate. Gardner v. Gardner, 22 Wendell, 526; S. C. 7 Paige, 112; 2 Kent, (5th ed.) 164, and note.

⁽³⁾ See 1 Madd. Ch. Pr. (4th Am. ed.) 475; 2 Kent, (5th ed.) 164, and note.

wife to so much of the bill as sought a discovery from her whether Decree against she had a separate estate or not, was allowed (p).

It appears, however, that where a married woman having a general power of appointment, by deed or will, over real or personal estate, makes by her will her separate property liable to the payment of her debts, a Court of Equity will lay hold of the estate so devised, and apply it in the payment of written engagements entered into by her, and in the discharge of her general debts.— In the case of Owens v. Dickenson (q), where a married woman had made her will in persuance of a power, and thereby charged her real estate with the payment of debts, Lord Cottenham, entered into the principles upon which Equity enforces the contracts of When conmarried women against their separate estate, and rejected the the- against sepaory, that such contracts are in the nature of executions of a pow-rate estate. er of appointment; he observed, "that the view taken by Lord Thurlow, in Hulme v. Tenant, is more correct. According to which, the separate property of a married woman, being a creature of equity, it follows, that if she has a power to deal with it, she has the other power incident to property in general, namely, the power of contracting debts to be paid out of it; and inasmuch as her creditors have not the means at Law of compelling payment of those debts, a Court of Equity takes upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property, as the only means by which they can be satis-Acting upon this principle, Lord Cottenham referred it to the Master, to inquire what debts there were to be paid under the provisions of the will (1).

(p) Ibid.

(q) Cr. & Ph. 48.

Eq. Jur. § 1398.

The question, whether the wife's engagements shall bind her separate property, seems, it is remarked by Mr. Justice Story, to turn by the modern doc-

⁽¹⁾ It seems to be now settled, that a feme covert is not personally liable for any debt. See the latter part of the note (1), Chassaing v. Partridge, 5 Sumner's Vesey, 17; Socket v. Wray, 4 Bro. C. C. (Perkins's ed.) 485, and notes; 2 Story Eq. Jur. § 1391; Owens v. Dickinson, 1 Craig. & Phil. 48; Aylett v. Ashton, 1 Mylne & Craig. 105, 111; Gardner v. Gardner, 22 Wendell, 526; Hulme v. Tenant, 1 Bro. C. C. (Perkins's ed.) 16-21, and notes.

Her separate property is not liable in Equity for the payment of her general debts, or for her general personal engagements. If, therefore, a married woman, should during her coverture, contract debts, generally without doing any act indicating an intent to charge her separate estate with the pay-ment of them, Courts of Equity will not entertain any jurisdiction to enforce payment thereof out of her separate estate during her life. 1 Madd. Ch. Pr. (4th Am. ed.) 474, 475; 2 Roper, Husband and Wife, ch. 21, § 2, p. 235, 238; Greatly v. Noble, 3 Madd. 94; Aguilar v. Aguilar, 5 Madd. 418; 2 Story

Abatement. Feme covert bound by a decree of fore-

closure;

If the equity of redemption of a mortgaged estate comes to a married woman, and a bill brought against her and her husband to foreclose it, upon which a decree for foreclosure is pronounced, the wife is absolutely foreclosed, and will not be allowed time to show cause against the foreclosure after her husband's death (r); and where a widow filed a bill to set aside a decree of foreclosure pronounced against her and her husband during coverture, and to be let in to redeem, and the mortgagee pleaded the proceedings and decree in the former cause, the plea was allowed (s).

- also by a sale under a decree.

Where an estate has been sold under a decree of the Court, a feme covert is as much bound by the decree as a feme sole, although it may be to her prejudice; as it would most ruinously depreciate the value of property sold under a decree in Equity, if where there is neither fraud nor collusion in the purchaser, his title could be defeated. It is to be observed, however, that a decree obtained by fraud is invalid (t).

Not by death of husband.

Where a suit has been instituted against a man and his wife, and the husband dies pending the proceedings, the suit will not be abated. Thus, where a bill was filed against baron and feme executrix for a legacy, and after the defendants had answered and witnesses had been examined, and publication passed, the husband died; it was insisted that the wife was not bound by the answer, nor by the depositions taken during coverture, but the Court held that there was no abatement, and that the wife was bound by the answer and depositions; though it was held that in the case of the wife's inheritance it might be otherwise (u).

But where a new interest accrues to wife.

But although where a bill has been exhibited against a man and

(r) Mallack v. Galton, 3 P. Wms. 352. 489; Kennedy v. Daly, 1 Scho. & Lef. 355.

(2) Ibid. (u) Shelberry v. Briggs, 2 Vern. (t) Burke v. Crosbie, 1 Ball & B. 248; 1 Eq. Ca. Ab. 1, pl. 4, S. C.

trine upon her intention to create a charge on her separate estate, either as an appointment or as a disposition of it by a contract in the nature of an appointment. 2 Story Eq. Jur. § 1401.

pointment. 2 Story Eq. Jur. § 1401.

For circumstances, which are held to show an intent to charge her separate estate, see 2 Story Eq. Jur. § 1400, 1401; Greatly v. Noble, ubi supra; Stuart v. Kirkwall, 3 Madd. 387; 2 Roper, Husband and Wife, ch. 21, § 3, p. 243, 244; Murray v. Barbe, 4 Sim. 82; S. C. 3 My. & Keen, 209.

The fact, that the debt has been contracted during the coverture, either as principal or as surety, for herself, or for her husband, or jointly with him, seems ordinarily to be held prima facie evidence to charge her secrete estate without any proof of a positive agreement or intention so to

separate estate, without any proof of a positive agreement or intention so to do. 2 Story Eq. Jur. § 1400. See Crosby v. Church, 3 Beavan, 489; Gardner v. Gardner, 22 Wendell, 526.

his wife, and the husband dies pending the suit, there is no abate- Abatement. ment, and the wife will be bound by the former answer and proceedings in the cause; yet where, by the death of the husband, a new interest arises to the wife, it seems that she will not be bound by the former answer, and that a supplemental bill ought to be filed, Supplemental for the purpose of giving her an opportunity of putting in another filed. defence, in respect of her newly acquired interest. Thus, where a bill was filed by the assignees of a married man to compel the specific performance of a contract for the sale of a part of his estate, to which the wife was made a co-defendant in respect of certain terms of years which were vested in her as administratrix of a person to whom the terms had been assigned to protect the inheritance, and she had joined with her husband in putting in an answer, by which she claimed to be dowable out of the property; upon the death of her husband an objection was taken to the suit being proceeded with till a supplemental bill had been filed against her, in order to give her an opportunity of making another defence in respect of the right of dower which had become vested in her, and Sir Thomas Plumer, M. R., said, that her former answer could not be pressed against her, because, in the former case, she was made a party as administratrix; but the right to dower which she then had was not claimed by her as representative, but in her own character, and it was an interest that had devolved upon her since her answer was put in (x). His Honor, therefore, held the suit to be defective. Whereupon a supplemental bill was filed against the widow, in order to enable her to claim, in her separate character, what she had before claimed in her character of wife. Upon hearing the cause, however, Lord Eldon, although he recognized the principle laid down by Sir Thomas Plumer, said, that he should have been inclined, in that case, to have come to a different decision, as he thought that it would have been difficult for the widow, in her answer to the supplemental bill, to state her case differently from the way in which it had been stated in her former answer (v).

It follows from what has been before stated, that where a man By death of and his wife are defendants to a suit, if the wife dies there will be an abatement of the suit. Thus, where a man having married an administratrix, the plaintiff obtained a decree against him and his wife, after which the wife died; it was held the suit was abated,

⁽z) Mole v. Smith, 1 Jac. & W. 254.]  $(\vec{y})$  Mole v. Smith, Jac. 495. 665; [1 Smith Ch. Pr. (2d Am. ed.)

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and that the administrator ought to be made a party before any further proceedings could be had in the cause (z). For the means by which the plaintiff compels the appearance and answer of the husband and wife, in those cases in which they answer jointly; and for the process in those cases, in which, according to the principles above laid down, a separate answer, by either the one or the other, ought to be filed, the reader is referred to the Chapters on Process

### SECTION VII.

### Idiots and Lunatics.

Defend by committees: who must be parties;

An idiot or a lunatic may, as we have seen, be made a defendant to a suit, but then he must defend by the committee of his estate (a); who, as well as the idiot or lunatic whose estate is under his care, is a necessary party to the suit respecting that estate (b) (1).

and apply to be made guardians.

If a suit be instituted against an idiot or a lunatic, the committee of his estate generally applies by motion or petition to be appointed guardian, to answer and defend the suit, which is ordered of course; the guardianship being rarely, if ever, assigned by commission, as in other cases (c) (2).

Method of put-

In a town cause, the guardian is sworn to his answer at the ting in answer, public office, in like manner as a guardian to an infant. In a country cause the answer is taken by commission; which is in the same form, and executed in the same manner, mutatis mutandis, as in the case of an infant answering by guardian (d) (3).

> (z) Jackson v. Rawlins, 2 Vern. 195, Ed. Raithby, n. 1.
> (a) Lord Red. 82.

(b) Lord Red. 4. Hind. 252.

(d) Ibid.

But in a suit where there are conflicting interests between a lunatic and his committee, which must be settled in the cause, both should be made parties. Teal v. Woodworth, 3 Paige, 470.

⁽¹⁾ Story Eq. Pl. § 70; Harrison v. Rowan, 4 Wash. C. C. 202. In Brasher v. Van Cortlandt, 2 John. Ch. 242, 245, it was held not necessary, in New York, to make the lunatic himself a party defendant to a bill for payment of his debts, but his committee only, where he had a committee. So in Teal v. Woodworth, 3 Paige, 470.

 ⁽²⁾ New v. New, 6 Paige, 237.
 (3) The answer of an idiot or lunatic is similar to that of an infant, and should be sworn to by his committee, in the same manner as the answer of an infant is verified by his guardian ad litem. 1 Barbour Ch. Pr. 154.

If it happens that an idiot or lunatic has no committee, or a Idiots and Lucommittee has an interest opposite to that of the person whose property is entrusted to his care, an order may be obtained for ap- Where compointing another person as guardian for the purpose of defending mittee cannot conduct dea suit against him (e) (1).

fence

In Howlett v. Wilbraham (f) it is stated, that an order to this effect was obtained on motion by the plaintiff; but upon reference to the registrar's book, it appears that the application was made on the part of the defendant, who was not a lunatic, but was alleged to be a person of weak intellects (g). In some cases, however, it may be proper that the application was made by the plaintiff.

### SECTION VIII.

### Infants.

INFANTS as well as adults may, as we have seen, be made de-May be defendants to suits in Equity; and, in such cases, it is not necessary fendants. that any other person should be joined with them in the bill. nor is it usual for the plaintiff to describe them as infants in his bill, unless any question in the suit turns upon the fact of their in- Not usally defancy.

scribed as such in bill.

Although it is not necessary that in bringing a bill against in- Defend by fants the plaintiff, as in the case of married women, should join guardian. any other person with them; yet they are not permitted, on account of their supposed want of capacity, to defend themselves; and therefore, where a defendant to a suit is an infant, the Court will appoint a proper person to put in his defence for him, and generally to act on his behalf in the conduct and management of the

(e) Lord. Red. 82. (f) 5 Mad. 423.

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(g) Reg. Lib. 1820, A. fo. 4 sub nomine Howell v. Wilbraham.

⁽¹⁾ Hewitt's case, 3 Bland. 184; Post v. Mackall, 3 Bland. 486. Where the defendant is represented to be in a state of incapacity, the Court will not permit his answer to be received without oath and signature; though he is a mere trustee and without interest; but will appoint a guardian by whom he may answer. Wilson v. Grace, 14 Vesey, 172; Rothwell v. Benshell, 1 Bland. 373; Copous v. Kauffman, 3 Edw. 311. As to waiving the signature and oath of the answer, see _____ v. Lake, 6 Vesey, (Sumner's ed.) 171. note (a).

Duty of Guardian ad litem.

The person so appointed is called "the guardian of the infant;" and in the books is generally styled "the guardian ad litem," to distinguish him from the ordinary guardian (1).

The duty of such guardian is to put in the proper defence for the infant; and it seems that he is responsible for the propriety and conduct of such defence (2); and if the answer put in by

(1) In a suit against an infant, process should be served upon him, and a uardian ad litem appointed by the Court. Carrington v. Brents, 1 McLean, 174; Walren v. Hallett, 1 Ala. 379; Graham v. Sublett, 6 J. J. Marsh. 45.

In New York the appearance of an infant is entered by his guardian ad litem; who is appointed by the Court on petition for that purpose. 1 Barbour Ch. Pr. 83. See Knickerbocker v. De Freest, 2 Paige, 304; Grant v. Van Schoonhoven, 9 Paige, 255; Story Eq. Pl. § 70; Banta v. Calhoon, 2 A. K. Marsh. 167; Cato v. Easly, 2 Stewart, 214.

In Alabama, it is essential to the action of a guardian ad litem, that there should be a decree of the Court appointing him such guardian. Darrington v. Borland, 3 Porter, 10.

Infants above the age of fourteen years should be consulted in the appointment of a guardian ad litem, if that course would not be attended with too much trouble or expense. Walren v. Hallett, 1 Ala. 379.

Courts may appoint guardians ad litem to non-resident infants. v. Hallett, 1 Ala. 379; Graham v. Sublett, 6 J. J. Marsh. 45; Smith v. Palmer, 3 Beavan, 10.

Courts may provide reasonable compensation for guardians ad litem. Walren v. Hallett, 1 Ala. 379; Graham v. Sublett, 6 J. J. Marsh. 45. See Gott v. Cook, 7 Paige, 523.

It is error to enter a decree against infant defendants without assigning them a guardian ad litem. Roberts v. Stanton, 2 Munf. 129; Irons v. Crist, 3 A. K. Marsh. 143; St. Clair v. Smith, 3 Ham. 363; Ewing v. Highbee, 7 Ham. 198. See Darby v. Richardson, 3 J. J. Marsh. 544; Beverley v. Miller, 6 Munf. 99; Cravens v. Dyer, 1 Litt. 153; Shields v. Bryant, 3 Bibb, **525**.

The guardian must have accepted the appointment, and that fact should

appear of record. Daniel v. Hannagan, 5 J. J. Marsh, 49.
Where infant defendants had not been served with process, but upon in-

spection of the record it appeared, that, upon their motion, a guardian ad litem had been appointed, who proceeded in the cause, the Court held, that the decree against the infants was not void, and therefore could not be impeached in a collateral suit. Day v. Kerr, 7 Missouri, 426.

It is not necessary to serve a copy of a bill in Equity, on a guardian ad litem, after his appointment. Jones v. Drake, 2 Hayw. 237.

The Court will not appoint a person guardian ad litem, for an infant defendant on the nomination of the complainant. Knickerbocker v. De Freest, 2 Paige, 304. An infant defendant at law must appear by guardian, he cannot appear or plead by attorney. Knapp v. Crosby, 1 Mass. 479; Miles v. Boyden, 3 Pick. 213; Alderman v. Tirrell, 8 John. 418; Bedell v. Lewis, 4 J. J. Marsh. 562; Jeffrie v. Robideaux, 3 Mis. 33; Clark v. Turner, 1 Root, 200; Comstock v. Carr, 6 Wend. 526.

(2) Knickerbocker v. De Freest, 2 Paige, 304.

It is the special duty of the guardian ad litem to submit to the Court for its consideration and decisions.

consideration and decision, every question involving the rights of the infant affected by the suit. Ib.

If the guardian ad litem neglects his duty to the infant, whereby such infant sustains an injury, the guardian will not only be punished for his neglect, but he will also be liable to the infant for all the damages he may have sustained thereby. Ib.

Where a person consents to act as guardian ad litem, he must put in a

him for the infant should be reported scandalous or impertinent, Duty of Guarhe would be liable to the costs of it (h). Sometimes the guardian is ordered or decreed to perform a duty on behalf of the infant, his refusal or neglect to do which will subject him to the censure of the Court (i).

ad-litem

If the guardian of an infant defendant, or the next friend of an Who may be infant plaintiff, does not do his duty, or other sufficient ground be removed for non-performade out, the Court will remove him (k). It seems, however, mance of duty. that infants are as much bound by the conduct of those who con- Infants bound duct their case, as adults, provided their conduct be bona fide. by acts of guar-Thus although, by strictly speaking, where infants are concerned, the evidence in the Master's office must be taken upon interroga- Guardian may tories and not upon affidavit, yet it seems that if the solicitor for consent to evidence being the infant assents to, or acquiesces in that method of proceeding, taken by affithe infant will be thereby bound (1). In like manner, although davit before an heir at law is entitled, as of course, to an issue devisaoit vel Master. non, yet it seems that such issue may be waived on the part of the May waive ininfant (m). And so, although the Court will not, where infants an issue. are concerned, make a decree by consent without first referring it to the Master to inquire whether it is for their benefit, yet when once a decree has been pronounced without that previous step, it is considered as of the same authority as if it had been referred to the Master, and he had made a report thereupon that it would be for their benefit (n); in the same manner, an order for mainten- Decree made ance, though usually made upon reference to a Master, if made upon their consent binding. without would be equally binding (o) (1).

An infant defendant is as much bound by a decree in Equity as Infant bound a person of full age; therefore, if there be an absolute decree made by decree; unless in cases against a defendant who is under age, he will not be permitted to of fraud, colludispute it unless upon the same grounds as an adult might have sion or error. disputed it; such as fraud, collusion or error.

To impeach a decree on the ground of fraud or collusion, he may proceed either by a bill of review, or supplemental bill in the

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(k) Hind. 241.
(i) Ibid.

(m) Levy. Levy, 3 Mad. 245.
(n) Wall v. Bushby, 1 Bro. C. C.

k) Russell v. Sharpe, 1 J. & W.
                                                  (o) Ibid.
    Tillotson v. Hargrave, 3 Mad.
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pleading; and is not to stop the plaintiff by neglecting it, merely because he thinks his wards are improper or unnecessary parties. Farmers' Loan and Trust Co. v. Reed, 3 Edw. 414.

(1) See post, 219.

ring.

Parol demur- nature of a bill of review; or he may so proceed by original bill. He may also impeach a decree on the ground of error, by original bill; and he is not obliged, for that purpose, to wait till he has attained twenty-one (p).

What is error in a decree against infant.

Among the errors that may be assigned for the purpose of impeaching a decree against an infant, is the circumstance that in a suit for the administration of assets against an infant heir, a sale of the real estate has been decreed before a sufficient account has been taken of the personal estate (q). And so, if an account were to be directed against an infant in respect of his receipts and payments during his minority, such a direction would be erroneous (r).

Another ground of error for which a decree against an infant man be impeached is, that it does not give the infant a day after his coming of age to show cause against it in cases where he is entitled to such indulgence (s) (1).

Parol demurring at Law;

in Equity.

It was an established rule at Common Law, that in all actions for debt against infant heirs by specialty creditors of their ancestors, either party was entitled to pray that the parol might demur, or that the proceedings might be stayed until the heir had attained his full age (t). This rule was the foundation of a similar practice in Equity in like cases (u), so that when any suit was instituted either by a specialty creditor, or by a simple contract creditor; the equity of which depended upon the legal liability of the heir to pay out of descended assets the specialty debts of his ancestor, no relief could be obtained against the heir during his minority, but the decree contained a direction for liberty to apply when the heir should have attained his full age, accompanied, in the case of a suit by a simple contract creditor, with a declaration of the right to have the assets marshalled (x). Courts of Equity did not, however, confine this species of protection to cases precisely similar to those in which the parol could demur at Law: but by a kind of analogy, they adopted a second rule by which,

⁽p) Richmond v. Tayleur, 1 P. (g) Bennett v. Hamill, 2 Sch. & Lef. 566.

⁽r) Hindmarsh v. Southgate, 3 Russ. 324.

⁽s) Bennett v. Hamill, 2 Sch. & Lef. 566.

⁽t) Bl. Com. 3 vol. 300; Plasket v.

⁷ Preeby, 4 East Com. Dig. Enfant [D] 3; ib. Pleas, 2 [E] 3, 485.

(a) Chaplin v. Chaplin, 3 P. Wms. 364; Lechmere v. Brazier, 2 Jac. & W. 287; Smith v. Cotton, Ca. Temp. Talb. 198.

⁽z) Seton on Decrees, 268.

^{(1) 2} Kent, (5th ed.) 245.

in cases of foreclosure and partition, and in all cases in which the Parol Demurreal estates of an infant were to be sold or conveyed under a decree of the Court, and consequently the execution of the conveyance was necessarily deferred, the infant had an opportunity, after attaining twenty-one, to show cause against the decree (1). For Ofgiving a day this purpose a provision was inserted in the decree, giving the in- to show cause. fant a day to show cause against it within a certain time after he came of age. The words of the decree in such cases were as follows; "And this decree is to be binding on the infant, unless being served with process for that purpose, he shall, within six months after he shall have attained his age of twenty-one years, show unto this Court good cause to the contrary." The insertion of this clause in a decree for a conveyance by an infant of his estate, was so strictly insisted upon in all cases, that the omission of it has been considered as an error in the decree (y).

By the stat. 1 Will. IV. c. 47, however, the rule for the parol Parol demurdemurring has been abolished, and the cases, in which the clause rer taken away by 1 Will. IV. giving the infant a day to show cause ought to be introduced, have c. 47, s. 10. been materially lessened in number (2). For by the 10th sect. of that statute, it is enacted, that from and after the passing of the Act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur; but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of the Act be carried on or prosecuted against any infants, where, according to law, the parol did not demur.

And by the 11th section where any suit hath been or shall be instituted in a Court of Equity for the payment of any debts of any person or persons deceased, to which his or their heir or heirs, devisee or devisees may be subject or liable, and such Court of Equity shall decree the estates liable to such debts or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of such heir or heirs, devisee or devisees, an immediate conveyance thereof could not, as the law then stood,

(v) Richmond v. Tayleur, 1 P. Wms. 734.

¹⁾ See Shields v. Bryant, 3 Bibb, 525.

⁽²⁾ See 2 Macpherson, Infants, (Lond. ed. 1842,) 360, 361, 411.

Day to show Cause.

In suits for payment of debts, Court may compel infant to convey.

be compelled; in every such case, such Court shall direct, and if necessary, compel such infant or infants to convey such estates so to be sold, by all proper assurances in the Law to the purchaser or purchasers thereof, and in such manner as the said Court shall think proper and direct, and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same, of the full age of twenty-one years.

Act applies to infant devisees as well as to heirs;

In consequence of the last section, the law now is, that wherever an estate vested in an infant is ordered to be sold for the payment of the debts of the person through whom he claims either as heir or devisee, a conveyance of such estate to a purchaser may be immediately made by the infant, under the sanction of the And the heir of a devisee may be compelled to join in the conveyance to a purchaser, although the words of the Act refer only to the heir or heirs, devisee or devisees of the person or persons deceased, whose debts are to be satisfied (z). It is to be observed, that the 11th section of the Act extends

s. 11, applies only to sales for payment of . debta

only to cases where estates are ordered to be sold for the satisfaction of any debts of any person or persons deceased; there are other statutes giving to the Court jurisdiction, under certain circumstances, to order the immediate conveyance of an infant's estate (a), but in all cases to which these statutory provisions are not made applicable, the old practice of the Court remains unaltered; and the clause giving the infant a day to show cause must still be inserted. Thus, in cases of partition, where mutual conveyances are to be executed, and any of the conveying parties are infants, the conveyances cannot be executed by the infants till twenty-one (a); and a day will be given to them after attaining that age (b), to show cause against the decree. It seems that, formerly, where decrees were paid for partition, and some of the parties were infants, and others adult, the practice was to direct mutual conveyances to be executed by the adult parties, and by the infants at twenty-one, unless they should show cause to the contrary (c);

now, however, the practice appears to be not to direct a conveyance by any of the parties till all the infants shall have attained

In other cases a day to show cause still given.

In cases of partition. Where infants concerned, no conveyances directed till they attain 21.

⁽z) Brook v. Smith, 2 Russ. & M.

⁽a) 11 Geo. IV. & 1 Will. IV. c. 61; 4 & 5 Will. IV. c. 23; and & 2 Vic. c. 69.

⁽a) Tuckfield v. Buller, 1 Dick 241; Amb. 197, S. C.; Seton, 296, n. (b) Hubble v. Read, 1 Dick. 243, n. (c) Tuckfield v. Buller, 1 Dick. 242.

twenty-one, and have had an opportunity of showing cause against Day to show the decree; in the mean time the decree only extends to make the partition, give possession, and order enjoyment accordingly, till effectual conveyances can be made (d).

In Eyre v. The Countess of Shaftesbury (e), it is said, that in Day not given, all decrees against infants, even in the plainest cases, a day must conveyance be given them to show cause when they become of age. Hardwicke, however, in Sheffield v. The Duchess of Buckingham (f), said, that he took it to be the course of the Court not to give a day unless a conveyance was directed, either in form or substance; and this upon reference to the cases referred to in the note appears to be the most correct statement of the practice (g). As a further confirmation of the rule as laid down by Lord Hard- Nor where dewicke, it may be observed, that where a bill is filed for the purpose tablish a will: of establishing a will of real estate against an infant heir at law, no day is ever given in the decree for the infant to show cause nor where leagainst it; and also, that in cases where the legal estate is in trustees. tees, and an execution of the trust is declared, it has been held that there is no occasion to give a day to show cause to an infant cestui que trust (h).

Lord directed.

gal estate in

There is one case, nevertheless, in which the rule as laid down by Lord Hardwicke is subject to exception, namely, that of foreclosure against an infant (i); in that case, although no conveyance is required from the infant, either in form or substance, he will be allowed six months after he comes of age to show cause against the decree (k) (1).

(d) Vide the decree in Agar v. Fairfax, 17 Ves. 545, 554, and Attorney-general v Hamilton, 1 Mad. 214; as to the practice where the infant is plaintiff, vide supra.

(e) 2 P. Wms. 102.

(f) 1 West. 684.

(g) Thus where in a suit instituted

previously to the 1 Will. IV. c. 47, lands had been devised to trustees to be sold for payment of debts, and the heir at law was an infant, no day was given him to show cause, because the land being devised to trustees, nothing descended to the infant, so that there was no necessity for him to join in the conveyance. (Cook v. Parsons, Prec. Ch. 184; I Eq. Ca. Ab. 289, a. 4; 2 Vern. 429.) But in an-

other case there was a devise of all the testator's real and personal estate for the payment of his debts, and an appointment of executors, but no specific devise of the real estate was named, Lord Hardwicke directed the infant heir to convey at twenty-one, unless, &c. (Blatch v. Wilder, 1 Atk. 421; vide etiam, Uvedale v. Uvedale, 3 Atk. 119.)

(h) Thorston v. Blackburn, 2 Keb. 7; 1 Harrison, Ch. Prac. Ed. Newl.

(i) Booth v. Rich, 1 Vern. 295; Williamson v. Gordon, 19 Ves. 114; Anon. Mos. 66; Bennet v. Edwards, 2 Vern. 392.

(k) Mallack v. Galton, 3 P. Wms. 352.

⁽¹⁾ In decrees of foreclosure against an infant, there is, according to the

Foreclosure against. A day to show cause must still be given.

In the recent case of Price v. Carver (1), the question was argued, whether since the stat. 1 Will. IV. c. 47, a decree for foreclosure against an infant defendant, ought to contain a direction that he should have a day to show cause after attaining his full age. Lord Cottenham, in his judgment, explained the distinction between cases of parol demurrer in Equity, and cases in which a day was given to the infant to show cause; and observed, "All cases of foreclosure and partition, and all others in which a conveyance is required from an heir, except those in which the parol would demur at Law, are cases in which a day is given, but the parol does not demur. Of all such cases, the statute takes no notice, and affords no remedy for them, except that, by the eleventh section, it enables the Court to take from the infant the legal estate of property decreed to be sold for the payment of debts, but for that purpose only. In all other cases, in which a conveyance is required from an infant, the law remains as before, and the practice, therefore, must remain the same. Accordingly, the decree for foreclosure made in that cause, contained the usual direction, giving the infant a day to show cause after he should attain the age of twenty-one.

It is to be observed, however, that in cases of foreclosure, the only cause which can be shown by the defendant is error in the decree; and it has been held that he may not unravel the account, nor is he so much as entitled to redeem the mortgage by paying what is due (m).

And in the orforeclosure absolute.

The clause giving the infant a day to show cause against a deder for making cree of foreclosure after attaining twenty-one, must be inserted in the order for making the decree absolute, as well as in the original decree; and in Williamson v. Gordon (n), an order was made up-

> (l) 3 M. & C. 167. (m) Mallack v. Galton, 3 P. Wms. 352; Lyne v. Willis, ib. n. B. This, however, must not be understood as as applying to cases where the decree

has been obtained by fraud, or where the infant claims by a title paramount to the mortgage. Vide post, 185.
(a) Williamson v. Gordon, 19 Ves. 114.

old and settled rule of practice in Chancery, a day given when he comes of age, usually six months, to show cause against the decree, and make a better defence, and he is entitled to be called in for that purpose by process of subpana. 2 Kent, (5th ed.) 245; Jackson v. Turner, 5 Leigh, 119; Miller v. Dennis, 3 John. Ch. 367.

Unless the rule is dispensed with by Statute regulations in specific instances, as in partition and foreclosure, it is the rule in New York, that an infant is to have six months after coming of age, to show cause against a decree. This must be done whenever the inheritance is bound. The right of the parol to demur is abolished by Statute in New York, in all cases of descent and devise. Harris v. Youman, 1 Hoff. Ch. R. 178.

on motion for varying a decree in which the clause had been omitted, by its insertion (1).

Foreclosure against.

Where a mortgage in fee had been executed, with the usual cove- Where copynants for title by the mortgagor, but it afterwards appeared that hold not surthe mortgaged premises were in fact copyhold land, which never having been surrendered to the mortgagee, descended upon the death of the mortgagor to an infant heir, Lord Alvanley, M. R., although he was clearly of opinion that the covenant in the mortgage deed was a contract for a valuable consideration affecting the heir, would not make a decree directing the heir to surrender the estate, and in default of payment to be foreclosed; but said, that the mortgagor must get the legal estate conveyed to him before he would direct a foreclosure. His Honor, however, afterwards made a decree, declaring that the covenant bound the land, and directed an account of what was due to the plaintiff for principal, interest and costs, upon payment of which, within six months after the Master should have made his report, the plaintiff was to reconvey the mortgaged premises to the defendant, &c.; but in default of such payment, the plaintiff was to be let into possession of the mortgaged premises, and to enjoy the same till the defendant attained twenty-one years, upon doing which the defendant was directed to surrender the mortgaged premises to the plaintiff; and it was declared that the decree should be binding, unless upon being served with a subpæna to show cause, he should within six months after attaining twenty-one show cause to the contrary (o) (1).

It was said by the Court in Booth v. Rich (p), that where there Where sale deis an infant defendant to a bill of foreclosure, the proper way is to creed instead. decree the lands to be sold to pay the debt, and that such a sale would bind the infant; but in Goodier v. Ashton (q), Sir W. Grant, M. R., said, that the modern practice was to foreclose infants, and refused to refer it to the Master to inquire whether a sale would be for the benefit of the infant. In a subsequent case, however, Lord Eldon said (r), it would be too much to let an infant be foreclosed, when if the mortgagee would consent to a sale, a surplus might be got of perhaps 4,000L, considered as real estate for the benefit of the infant. His Lordship accordingly made a decree, by which it was referred to the Master to inquire and report whether it would

⁽r) Mondey v. Mondey, 1 V. & B. (a) Spencer v. Boyes, 4 Ves. 370.
(p) 1 Vern. 295.
(q) 18 Ves. 84.

Foreclosure.

Sale instead of be for the benefit of the infant that the estate should be sold. that case the reference was to be made only in case the mortgagee consented, and the same appears to have been the order in Pace v. Marsden (s); but in Wakeham v. Lome, and Hamond v. Bradley (t), like decrees appear to have been made without its being stated that they were made by consent, or even that a sale was prayed (1). It is to be observed also, that in those cases, as well as in Pace v. Marsden, the decree was made for a sale without a previous reference to the Master to inquire whether it would be for the benefit of the infant. In Pace v. Marsden, however, it seems that a sale was prayed by the bill.

Where day given to show cause.

Purchaser must accept order of Court as security for conveyance.

Where an estate is directed to be sold, and a day is given to an infant to show cause after he attains twenty-one, a direction is generally given in the decree, that in the mean time a purchaser under it shall hold and enjoy the estate against such infant until he attains such age; and it seems that a purchaser buying the estate under such a decree must accept the order of the Court for a future conveyance as a sufficient security (u). In such a case the purchaser must presume that the Court has taken the necessary steps to investigate the right of the parties, and that on such investigation it has properly decreed a sale (x); and the Court so far protects a purchaser under a decree, that it will not permit his title to be affected by a mere error in the decree. Thus in Bennett v. Hamill (y), where a bill was filed by an infant defendant on attaining twenty-one, against the heir of a purchaser under a decree, and other parties interested in the estate, to impeach the decree as

(s) Seton on Decrees, 275.

(x) Bennett v. Hamill, 2 Sch. &

Lef. 566. (t) Ibid. (u) Powell v. Powell, Mad. & Geld.

(y) Ibid.

In case of a decree for the sale of the mortgaged premises, the decree, it is understood, will bind the infant. Mills v. Dennis, 3 John. Ch. 367, 369; 2 Kent, (5th ed.) 245.

⁽¹⁾ See Powell v. Robins, 7 Sumner's Vesey, 211, note (1), and cases citèd.

See Harris v. Harris, 6 Gill & John. 111; Davis v. Dowling, 2 Keen, 245; Garland v. Living, 1 Rand. 396; Coger v. Coger, 2 Dana, 270, in reference to the circumstances under which Courts will decree a sale of the lands descended to infants.

In Mills v. Dennis, 3 John. Ch. 367, which was a bill for foreclosure of a mortgage, Mr. Chancellor Kent observed, "The practice, with us, has been to sell, and not to foreclose, as well where infants, as where adults are concerned. I think this course must generally be most beneficial to the infants, as well as to the creditors; and there can be no doubt of the authority of the Court to pursue it."

erroneous, and to recover the estate, the principal question was, Sale of Estates whether a sale under a decree of the Court was to be impeached on the grounds; 1st, That the heir of the debtor not being of age, and being required to join in the conveyance, had not a day to show cause. 2ndly, That there was no sufficient account of the personal estate; and Lord Redesdale dismissed the bill as against the representatives of the purchaser, although he allowed the suit to proceed against the other parties. In delivering his judgment his Lordship observed, that after considering the subject a good deal, he thought it would be too much to say that a purchaser under a decree of that description could be bound to look into all these circumstances; that, if he was, he must go through all the proceedings from the beginning to the end, and have the opinion of the Court that the decree is right in all its parts, and that it would be impossible to alter it in any respect; that the cases warranted no such opinion; and that, on the contrary, as far as he could find, the general impression they give is, that a purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has on that investigation properly decreed a sale. Then he is to see that this is a decree binding the parties claiming the estate; that is, to see that all proper parties to be bound are before the Court; and he has further to see, that taking the conveyance he takes a title that cannot be impeached aliunde. He has no right to call upon the Court to protect him from a title not in issue in the cause, and in no way affected by the decree; but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title, although the decree may be erroneous, and therefore to be reversed, the title of the purchaser ought not to be invalidated for insufficiency (z).

But although mere irregularities and errors in the proceedings will not invalidate a sale, or prevent a good title from being made under a decree; yet it seems that if there is a material error in substance as well as in words and form, a purchaser may object to the title, and the Court will discharge him from his contract: thus, in the case of Calvert v. Godfrey (a), where a sale of an infant's estate was ordered merely because it was beneficial to the infant, and without there being any person who had a right to call upon the Court to sell the estate for the satisfaction of a claim or debt, Lord Langdale, M. R., considering that such an order was not

⁽z) Vide Lloyd v. Johnes, 9 Ves. (a) 6 Beav. 106.

Sale of Estates belonging to.

within the jurisdiction of the Court allowed an objection to the title made, in consequence of the irregularity of the decree.

Answer of infant.

Although the answer of an infant is put in upon the oath of the person appointed his guardian (b), the infant is not bound by such answer, and it cannot be read against him (1); the true reason of which is, because in reality it is not the answer of the infant, but of the guardian, who is the person sworn, and not the infant; and the infant may know nothing of the contents of the answer put in for him, or may be of those tender years as not to be able to judge This being the case, it would be useless, and occasion of it (c). unnecessary expense, to call upon an infant to put in a full answer to the plaintiff's bill (d); and it is therefore held that exceptions will not lie to the answer of an infant, for insufficiency (e).

Exceptions willanot lie to.

Injunctions against proceedings at law.

As exceptions will not lie against an infant's answer, they cannot of course be shown as cause against dissolving an injunction obtained by the plaintiff to restrain proceedings at Law commenced on behalf of an infant; consequently, a plaintiff is in general precluded from showing any cause against dissolving an injunction obtained to restrain proceedings at Law commenced on behalf of an infant. For as he cannot by exceptions compel a discovery, the answer of the defendant may be, and most usually is such, that no admission can be extracted from it; indeed, if it were a full answer, the plaintiff would not be in a better situation, as the rule of the Court prevents its being read against the infant upon any

(b) Eccleston v. Petty, Carth. 79; 3 Mod. 258; Comb. 156; Leigh v. Ward, 2 Vent. 72; Legard v. Shefvvad, z vent. 12; Legaru v. Sner-field, 2 Atk. 377; Cowdell v. Tatlock, 3 Ves. & B. 19; Savage v. Carroll, 1 B. & B. 548; Cowling v. Ely, 2 Stark. 366; Hawkins v. Luscombe, 2 Swans.

Wms. 236.

(d) Strudwick v. Pargiter, Bunb. 338.

(e) Copeland v. Wheeler, 4 Bro. C. C. 256, [Perkins's ed. note (1), and cases cited]; Lucas v. Lucas, 13 Ves. 274, [Sumner's ed. note (a)]; Lord Red. 254.

⁽c) Wrottesley v. Bendish, 3 P.

^{(1) 2} Kent, (5th ed.) 245; Leggett v. Sellon, 3 Paige, 84; Stephenson v. Stephenson, 6 Paige, 353; Rogers v. Cruger, 7 John. 581; Bulkley v. Van Wyck, 5 Paige, 536; Stewart v. Duvall, 7 Gill & John. 180; Bank of Alexandria v. Patton, 1 Robinson, (Va.) 500.

It is the duty of the Court to see, that the rights of an infant are not prejudiced or abandoned by the answer of his guardian. Barret v. Oliver, 7 Gill

[&]amp; John. 191.

The answer of an infant by his guardian ad litem, is not evidence in his litem. Bulkley v. Van Wyck, 5 Paige, 536; Stephenson v. Stephenson, 6 Paige, 353. favor, although it is responsive to the bill, and sworn to by the guardian ed

A plaintiff cannot in any form of pleading compel an infant to become a witness against himself. Bulkley v. Van Wyck, whi supra.

In Lucas v. Lucas (f) it was argued, that although the Of Answers by rule is, that the answer of an infant may be grossly insufficient, and the plaintiff cannot by taking exceptions compel a discovery from the infant, but must prove his case, yet the rule went no farther, and that an injunction might be dissolved upon an answer manifestly insufficient, and not meeting the equity of the bill. was held, however, that in all cases the plaintiff was bound to make out his case from the answer; and that unless the Court could from the answer see the equity, it would not interfere with the legal title.

It seems from the above case of Lucas v. Lucas, and that of Copeland v. Wheeler (g), that although a plaintiff cannot show exceptions for cause against dissolving an injunction upon the coming in of an infant defendant's answer, he may undertake to show cause upon the merits, and by that means gain a little time till the next day of motions.

An infant's answer is expressed to be made by his guardian, and form of. is generally confined to a mere submission of his rights and interest in the matters in question in the cause to the care and protection of the Court (1). The general saving at the begining, together with the denial of combination at the conclusion, common to all other answers, are omitted; for an infant is entitled to the benefit of every exception which can be taken to a bill without expressly making it, and he is considered incapable of the combination charged. The general traverse is also left out of a defendant's answer, because it cannot be excepted to for insufficiency (h).

Although an infant cannot be called upon to put in a full answer May state deto the plaintiff's bill, yet he may state in his answer anything which fence. he means to prove in the way of defence (i).

In many cases the answer of an infant ought not to be confined to a mere submission of his rights to the protection of the Court; thus it may be for his benefit, that the defence intended to be made on his behalf, should be raised by his answer, and thereby made known to the plaintiff; or it may be necessary to state facts which would otherwise not be in issue in the cause so as to enable the infant to give evidence thereon-but whatever admission there may be in the answer, or whatever points may be tendered thereby

⁽f) 13 Ves. 274. (g) 4 Bro. C. C. 256. (A) Lord Red. 254.

⁽i) Per Lord Chief Baron Richards, in Attorney-general v. Lambirth, 5 Price, 398.

⁽¹⁾ Mills v. Dennis, 3 John. Ch. 367, 368.

Of Answers by in issue, it appears that the plaintiff is not in any degree exonerated from his duty in proving as against the infant the whole case upon which he relies (j) (1).

Infant dissatisfied with answer may file another. Where an answer has been put in by a guardian on behalf of an infant defendant, and the infant comes of age, and is dissatisfied with the defence put in by his guardian, he may apply to the Court for leave to amend his answer, or to put in a new one (2); and it seems that this privilege applies as well after a decree has been made as before.

But as early as possible after twenty-one.

An infant, however, wishing to make a new defence, must apply to the Court as early as possible after attaining twenty-one, for if he is guilty of any laches, his application will be refused (1) (3). Thus in Cecil v. Lord Salisbury (m), where an heir-at-law, being a minor, had by his answer desired that the trust estate might not be sold, and had offered to subject other lands not within the trust, for better raising the portions, so that a sale of the trust estate would not be necessary, and the question at the hearing of the cause was, whether he should be bound by this offer in his answer or not, the Court held him to it, because by that means he had delayed a sale, observing, that if he would have departed from what he had offered, he ought immediately to have applied to the

(j) Holder v. Hearn, 1 Beav. 445. (k) Kelsall v. Kelsall, 2 M. & K. 409.

(l) Bennett v. Lee, 1 Dick. 89; in Mr. Wyatt's edition of Dicken's Reports, the case of Bennett v. Lee, in 2 Atk. 487 & 529; are referred to as

S. C., but upon reference to that book it will be found that the case of Bennett v. Lee, there reported, occurred in 1742, whilst that in 1 Dick. was in 1743.

(m) 2 Vern. 224.

(2) Stephenson v. Stephenson, 6 Paige, 353; James v. James, 4 Paige, 115.

An infant defendant does not lose his right to object to the jurisdiction of the Court at the hearing, upon the ground, that the remedy is at law, although his guardian ad litem has omitted to raise such objection in his answer. Bowers v. Smith, 10 Paige, 193.

(3) Mason v. Debow, 2 Hayw. 178. Nor will it be granted on his coming of age without an affidavit, that he can now make a better defence than that previously put in. Bennett v. Leigh, 1 Dick. 89; Cecil v. Lord Salisbury, 2 Vern. 224.

An infant may also apply to put in a better answer at any time during the suit, and before coming of age, provided there is a foundation for it on the merits. Bennett v. Lee, 2 Atk. 487, 529; Savage v. Carroll, 1 Ball. & Beat. 549.

And he may, by petition merely, stay proceedings in the cause until he is prepared with his answer. Shield v. Bryant, 2 Marsh, 344; 3 Bibb, 525.

⁽¹⁾ Mills v. Dennis, 3 John. Ch. 367, 368; post, 219, note (1); 2 Kent, (5th ed.) 245; Winston v. Campbell, 4 Hen. & Munf. 477; Massie v. Donaldson, 8 Ohio, 377.

Court to have retracted his offer, and amended his answer. It is Of Answers by to be observed, that the cause was heard in 1691, and that the heir at law had come of age in 1687, and yet no complaint had been made, either that he had been defrauded or deceived, or that an improper defence had been made, but he acquiesced in the answer up to that time.

The same reasons which prevent an infant from being bound by Admissions his answer, operate to prevent his being bound by admissions in made on part any other stage of proceeding, unless indeed such admissions are of infant. for his benefit. Thus it seems that where an infant is concerned, no case can be stated by the Court of Chancery for the opinion of Nor case staa Court of Law, because an infant would not be bound by the admissions in such case (n). Upon the same principle it has been held, that an infant is not bound by a recital in a deed executed during infancy (o).

The consequence of this rule is, that where there are infant de-Necessary facts must be fendants, and it is necessary, in order to entitle the plaintiff to the proved against relief he prays, that certain facts should be before the Court; such Infant. facts, although they might be the subject of admission on the part of adults, must be proved against the infants (1). Thus where the bill stated that one of the defendants was out of the jurisdiction, and all the defendants, some of whom were infants, admitted the fact, but no proof had been gone into upon the subject, Sir J. Leach, V. C. said, that even if he could act upon the admission of the adult defendants, he could not act upon that of the infants (p). Where will to For the same reason, in the ordinary case of establishing a will be established relating to real estate, where the heir-at-law is an infant, it is always necessary to establish the due execution of the will by the examination of witnesses.

From the report of the cases of Cartwright v. Cartwright, and Sleeman v. Sleeman, in Mr. Dicken's Reports (q), it seems to have been held that where the heir at law in an original suit being adult, had by his answer admitted the due execution of the will, but died before the cause was brought to a hearing, leaving an infant heir, who was brought before the Court by revivor, the will must be proved per testes against the infant heir. But in Livesey Infant bound v. Livesey (r), Sir John Leach, M. R., held, that the circum-by admission

in original suit (p) Wilkinson v. Beal, 4 Mod. 408; against an-

⁽n) Hawkins v. Luscombe, 2 Swan. 392.

see post, page 200.
(q) 2 Dick. 545, 787. (e) Milner v. Lord Harewood, 18 (r) Cited 4 Sim. 132. Ves. 274.

⁽¹⁾ Ante, 216, note, 219, note.

Of Answers by stance of the first heir having admitted the will, rendered it unnecessary to prove it against the infant; and in a subsequent case (s), the V. C. of England expressed himself to be of the same opinion as the Master of the Rolls, and said that he had referred to the entries of the cases of Sleeman v. Sleeman, and Cartwright v. Cartwright, in the registrar's book; and that with respect to the former, no such thing as is mentioned by the reporter appears to have taken place; but the original heir having admitted the will, the Court established it; and with respect to the latter, all that was stated was, that on hearing the will and proofs read (not saying what proofs), the Court declared that the will ought to be

Master cannot receive affidavits under decree. established (t).

In proceedings in the Master's office, under a decree which directs witnesses to be examined upon interrogatories, if infants are concerned, the Master cannot, strictly speaking, receive affidavits; and where in such a case he had in a question of pedigree proceeded upon affidavits obtained from America, the Vice-Chancellor, on motion for that purpose, directed the Master not to proceed upon the affidavits, with liberty, under the circumstances, to apply to the Court, if by death or otherwise, it became impossible to obtain under a commission the evidence of persons who had made the affidavits (u).

Effect of by

In that case, however, it is to be observed, that the solicitor for the infant had not concurred in the mode of proceeding adopted by the Master; and that it is to be collected from the report that if he had, the parties would have been bound, as his Honor said, that generally speaking, infants are bound as much as adults are by the conduct of their solicitor.

Of replication to infant's answer.

It follows from what has been said above, that where a defendant to a suit is an infant, and it is necessary in support of the plaintiff's case that some fact should be established, which it is not expressly for the benefit of the infant to admit, the answer of the infant must be replied to, and the fact sought to be established proved by evidence derived from other sources than the infant's answer or admissions on his behalf made by those conducting the cause for him. Where, however, the case of the plaintiff is such as it is manifestly to the advantage of the infant to admit, as where an infant claims an interest under the same instrument as the plaintiff, in such cases it is not necessary to reply to the answer,

In what cases unnecessary.

⁽s) Lock v. Foote, 4 Sim. 132. (u) Tillotson v. Hargrave, 3 Mad (t) Vide etiam, Robinson v. Cooper, 494. ib. 131.

or to go into evidence to prove the execution of the instrument Of Admissions relied upon, and the cause may be set down for hearing upon the bill and answer. For the instrument under which both the plaintiff and the defendant claim, being stated and referred to in the bill, by the usual words, "as in and by the said Indenture, &c., reference being thereunto had, when produced will more fully appear," becomes part of the record, and as it is for the benefit of the infant as well as of the plaintiff that it is set up, no necessity exists for establishing it by any other proof. It is for this reason, also, that the general traverse, which is always inserted in the answer of adult defendants, is omitted in that of an infant: for as no admission can be made on the part of an infant which is not for his advantage, the insertion of such a traverse is unnecessary to protect him against any inference to his disadvantage being drawn from his not having specifically traversed any particular allegation in the bill, whilst by generally traversing all the allegations made by the plaintiff he would be precluded from taking advantage of such as are in his favor.

It is to be observed, that although where the plaintiff and infant Where neces defendant claim under the same instrument, it is not in general necessary to reply to the answer, and prove the execution of such instrument; yet where such instrument is in itself in derogation of any other right which the infant, but for its existence, might have in the subject-matter of the suit, then although the infant may take a benefit under the instrument, it will still be necessary to establish its execution by evidence; as where a plaintiff claims as a devisee of real estate, and the infant defendant also claims under the same will, but fills the character of heir at law of the testator, in such case the will must be established per testes, although the infant has an interest under it as well as the plaintiff. all cases in which any thing is stated in the defendant's answer which the plaintiff does not think proper to admit, the answer should be replied to, in order that the infant defendant may have an opportunity of proving his case.

We have seen before, that no infant can be bound by any admissions made in his behalf, unless such admissions are for his benefit; the consequence is, that in all cases where infants are defendants, the case against them must be established by strict evidence, and that they must have been parties to the suit when the witnesses were examined (1), if they have become parties sub-

⁽¹⁾ In Mills v. Dennis, 3 John. Ch. 367, which was a suit for foreclosure,

Evidence against.

sequently to the evidence being gone into, such evidence cannot be read against them (x).

Deeds and exhibits may be proved viva fant.

There seems to be no rule in the Court of Chancery which prevents the proving of exhibits viva voce, by order at the hearing, as voce against in- well in cases where infants are concerned as in others; though it seems to have been otherwise in the Exchequer (v).

Decree cannot

The Court will not in general make a decree by consent, where be by consent. infants are concerned, without first referring it to the Master, to inquire whether it will be for their benefit; yet when once a decree has been pronounced without that previous step, the authority of it is the same as if it had been referred to the Master, and he had made a report that it would be for their benefit (z); and such decree cannot be reversed unless upon such grounds as would authorize the reversal of it in any other case. It must not, however, be drawn up as made by consent, which would be error Although an heir at law is entitled to an issue devisavit vel non, and the Court cannot refuse it when asked for; yet if the counsel for an infant heir be satisfied that there is no ground to impeach the will, he is well justified in not asking for an issue (b).

Subpæna to show cause against decree.

pæna personal.

Where an infant has a day given him by the decree, to show cause against it, the process served upon him at his coming of age, is a writ of subpæna, which is a judicial writ (1). By the first Service of sub- Order of December, 1833, a form was provided for a subpana of this description; this Order of 1833 has however been discharged by the first of the Orders of May, 1845, which do not provide any form in place of the one abrogated. The service of a subpæna of this description must be personal, unless the party has left the kingdom, or has absconded to avoid service; in which case an order for substituted service may in some cases be obtained (c).

Making decree absolute.

If after service of the subpæna to show cause, the party does not appear within the time limited, the decree will be made abso-

(z) Quantock v. Bullen, 5 Mad. 84; and see Baillie v. Jackson, 10 Sim.

(y) Carlton v. Brightwell, 2 P Wms. 463.

(z) Wall v. Bushby, 1 Bro. C. C. **487**.

(a) Anon. Freem. 127.

(b) Levy v. Levy, 3 Mad. 245. (c) Elcock v. Glegg, 2 Dick. 764.

it was held, that there could be no valid decree against an infant, by default, nor on his answer by guardian; but the plaintiff must prove his demand in Court, or before a Master, and the infant will have a day in Court, after he comes of age, to show error in the decree. See Massie v. Donaldson, 8 Ohio, 377; Walton v. Coulson, 1 McLean, 125; Chalfant v. Monroe, 3 Dana, 35.

^{(1) 2} Kent, (5th ed.) 245, and note.

lute, without entering an appearance for him (d), upon motion, supported by affidavit of service and certificate of non-appearance, in like manner as a decree in default of appearance (e).

Decrees

It is said above, that in cases of foreclosure, the only cause Showing cause which can be shown by an infant after attaining twenty-one, against decree. against making the decree absolute, is error in the decree, and of foreclosure. that he will not be permitted to unravel the account, nor even to redeem the mortgage on paying what is due. This strictness, fraud. however, must not be understood as applying to cases in which fraud or collusion have been made use of in obtaining the de-Neither, it is apprehended, will the above rule apply Where infant's cree (f). to cases where the title claimed by the infant is paramount the title paramount the Thus, in a case where an estate had been conveyed to mortgage. the great-uncle and grandfather of the infant, as joint-tenants in fee, and upon the death of the great-uncle, the grandfather, being the survivor, had mortgaged the estate, and died, leaving the infant his heir at law. Upon a bill filed by the mortgagee against the infant to foreclose, the infant stated in his answer that the estate had been purchased and paid for by his great uncle, who devised the same to his grandfather for life, with remainder to his heirs in tail, and so claimed the estate as heir in tail by a title paramount the mortgage, but the Court decreed an account, and that the defendant should redeem or be foreclosed, unless he showed cause within six months after he came of age, on the ground that the grandfather being by the deed joint-tenant in fee with his brother, whom he survived, must have appeared to the mortgagee to have a good title. The infant, however, when he came of age, upon being served with a subpæna to show cause, moved for leave to amend his defence, by putting in a new answer, and swore that he believed he could prove that the mortgagee had notice of the trust for his great-uncle at the time he lent the money, which was a point not insisted upon in his former answer, and the Court made the order (g). The reason of this distinction between the case of a claim by the infant paramount the mortgage, and that of a claim subject to the mortgage, is obvious, for in the latter case it will be presumed that the Court would not have made the decree had it not been satisfied that the mortgage was properly executed, and therefore it would not be reasonable to allow a party claiming subject to that deed, to disturb the title which the mort-

^{73 (}f) Lloyd v. Barnes, 2 P. Wms. (d) Gilb. For. Rom. 166; Wharam v. Broughton, 1 Ves. 185. (e) 1 Harr. 425. (g) Anon. Mos. 66.

^{19*} 

Of showing Cause against Decrees.

gagee had acquired under it; but in the former case the mortgage may have been properly executed, and the account taken under it may have been perfectly correct, and yet the mortgagor may not have had a title to make the mortgage, in which case it would not be just to preclude the infant from an opportunity of establishing a case which, from the circumstance of its not having been insisted upon in the infant's answer, was not properly submitted to the decision of the Court at the time the decree was pronounced.

What canse may be shown.

In ordinary cases, where an infant has a day given him to show cause against making a decree absolute, he may either impeach the decree on the ground of fraud or collusion between the plaintiff and his guardian, or he may show error in the decree. may also show that he had grounds of defence which were not before the Court, or were not insisted upon at the hearing, or that new matter has subsequently been discovered, upon which the decree may be shown to be wrong.

Fraud and collusion.

Error how

shown.

Infant need .age.

If the late infant seeks to controvert the decree on the ground of fraud or collusion, he is not bound to proceed by way of rehearing or by bill of review, but he may impeach the former decree by an original bill, in which it will be enough for him to say, that the decree was obtained by fraud or collusion (1). He may in like manner impeach the decree by original bill, even though his ground of complaint against it is confined to error; and it is said, in Richmond v. Tayleur, that a very eminent practitioner (Mr. Vernon) in case of an erroneous decree against an infant, used always to advise the bringing of an original bill to set it aside, but in such bill to allege specially the errors in the former decree. In such cases it is not necessary for the infant to wait till he comes not wait till of of age before he seeks redress, but application for that purpose may be made at any time (i) (1).

> (A) Richmond v. Tayleur, 1 P. Wms. 737. In the case of gross fraud or collusion used in obtaining a decree, the Court will entertain an original bill for the purpose of impeaching it, even though the party complaining was not an infant at the time of the decree pronounced. Vide Lloyd v. Mansel, 2 P. Wms. 73; Sheldon v. Fortescue, 3 P. Wms. 111.

In general, however, where no fraud is alleged, the proceedings to set aside a decree, if it has been signed and enrolled, must be by bill of review, or if not signed and enrolled, by supplemental bill in the nature of a bill of review. Walley v. Berkhead, 3 Atk. 811; Gulley v. Baker, Ca. Tem. Talb. 201.

(i) Ibid.

If the late infant seeks to impeach the decree by showing that Of Showing he had grounds of defence which were either not before the Court Cause against or not insisted upon at the original hearing, he may apply to the Court, either by motion or petition, for leave to put in a new an- new defence. swer; and it seems that such application may be made ex parte, and is a matter of course (1).

He filed in aid.

Although it is a matter of course, that where an infant defend- Where crossant to a suit who has a day given him to show cause against the bill. decree after attaining twenty-one, may have leave to put in a new answer; yet if he was plaintiff in a cross bill, and that suit or any part of it has been dismissed, he will not be allowed to amend Bill of discovhis cross bill, or to file a new one for that same matter (m). may, however, file a bill of discovery in aid of the case intended to be made by his answer, and it seems that if he does so, the time of six months allowed by the course of the Court for a defendant to show cause why a decree should not be made absolute after he comes of age, is not so sacred but that in particular cases, and where the matter is of consequence, the Court may enlarge Of enlarging it, and therefore, in the case before referred to, of Trefusis v. Cot-time. ton, where a defendant on attaining twenty-one, and being served with a subpæna to show cause against a decree, filed a bill against the plaintiffs in the original suit for a discovery, and applied to the Court to have the time for showing cause enlarged till the defendants to the bill of discovery had put in their answer; the Lord Chancellor made an order for enlarging the time for three months after the six months were expired, and on that time being out, and the defendants not having put in a full answer, the time was twice enlarged upon motion quousque. It seems, however, from a subsequent notice of the same case (n), that an infant, after he attains twenty-one, cannot controvert the original decree by a new bill praying relief, unless for fraud or collusion, or for error (a), and that if he does so, the original decree may be pleaded in bar to such new bill.

Although where a day is given to an infant to show cause Infant must against a decree, he need not, as we have seen, stay till that time wait till of age. before he seeks to impeach it on the ground of fraud and collusion, or error (p); yet if he proceeds on the ground that he is dissatis-

⁽I) Fountain v. Carrier, 1P. Wms. 504; Napier v. Lord Effingham, 2P. Wms. 401; Bennett v. Lee, 2 Atk. 531; Trefusis v. Cotton, Mos. 308.
(m) Sir J. Napier v. Lady How-

ard of Effingham, Mos. 67-68.
(a) Ibid. 306.

⁽o) Richmond v. Tayleur, 1 P. Wms. 737.

⁽p) Ibid.

Of showing Cause against Decrees.

fied with the defence which has been made, and wishes to put in a new answer, he must in general wait till he has attained twentyone before he applies, because, if he should apply before, and there should be a decree against him upon the second hearing, he may with as much reason put in a third answer, and make the proceedings endless, and by this means leave it in the power of a guardian to put in a new answer for him during his minority, and so occasion infinite vexation. This was the opinion originally expressed by Lord Hardwicke, in the case of Bennet v. Lee (r); though he afterwards held, in the same case, that as the facts upon which the infant wished to rest his new defence were of long standing, and the witnesses were consequently very old, and might die before he came of age, the infant might put in a better answer (s). And so in Savage v. Carroll (t), leave was given to the infant defendant, upon the same grounds, to put in an amended answer before attaining twenty-one; but it was subsequently held in the same case, that where an infant before attaining twenty-one obtains leave to put in a new answer, he will thenceforth be considered as plaintiff, and as such will be bound by the decree (1).

A new answer good cause.

Where an infant defendant on coming of age, having obtained leave to put in a new answer, does so accordingly, he may show that fact for cause why the decree should not be made absolute. and the plaintiff must proceed upon the answer according to the rules of the Court in other cases (x).

Consequence of a new defence.

The consequence of an infant putting in a new answer is, that if it is replied to he may examine witnesses anew to prove his defence, which may be different from what it was before (z).

### SECTION IX.

# Persons of Weak Intellect.

A person reduced by age or infirmity to a second infancy, may defend by guardian (2).

- (r) 2 Atk. 487. (s) Ibid. 2 Atk. 532, vide etiam, 1 B. & B. 548.
- (u) Cotton v. Trefusis, Mos. 315. (x) Napier v. Lord Effingham, 2P. Wms. 401.
- (t) 2 B. & B. 244.

(1) Ante, 216, note.

Manleverer v. Warren, 2 Jones, 47.

A female defendant, above sixty years of age, who had been deaf and

It is said that the answer of a superannuated person put in by Answer may be guardian, may be read against him as an answer of one of full age put in, in person; and that the difference in this respect between such answer and that of an infant put in by guardian is, because an infant improves and mends, and therefore is to have a day to show cause after he comes of age; but the other grows worse, and is to have no day (v).

#### SECTION X.

## Of Bankrupts and Insolvent Debtors.

It is a general rule of Courts of Equity, that no person can be Not made demade a party to a suit in Equity against whom no relief can be fendants to bill prayed (1); and it follows as a consequence of this rule, that no praying relief; person whose interest in the subject-matter of the suit has been vested by act of Law in another, can be made a defendant; consequently, it has been held, that bankrupts and insolvent debtors, whose interests, whether legal or equitable, in the property, must have devolved upon their assignees, cannot be made parties to suits relative to any property which is affected by their bankruptcy or insolvency (z) (2).

Upon this principle, a demurrer put in by a bankrupt who was if made, may joined as a co-defendant with his assignees in a bill to enforce the demur. specific performance of an agreement entered into by him previously to his bankruptcy, was allowed (a); and so in Collet v. Wollaston (b), where a bill was filed by the purchaser, at an auction, of the reversionary interests of an insolvent debtor in certain stock against his assignee for an assignment and transfer, one of the questions at the hearing of the case was, whether the in-

(y) Leving v. Canely, Prec. Ch. 229.

⁽z) Whitworth v. Davis, 1 Ves. & B. 547; Golls v. Ward, 3 P. Wms. 311, n. 1.

⁽a) Whitworth v. Davis, 1 V. & B. 545; vide etiam, Griffin v. Archer, 2 Anst. 478; Lloyd v. Lander, 5 Mad. 288.

⁽b) 3 Bro. C. C. 228.

dumb from her infancy, was admitted to appear and defend by guardian.

Markle v. Markle, 4 John. Ch. 168.

(1) Story Eq. Pl. § 231, and cases cited in notes; Todd v. Stewart, 6 J.

J. Marsh, 432.

⁽²⁾ Story Eq. Pl. § 519, § 233, and note; De Wolf v. Johnson, 10 Wheat. 384.

In what cases solvent himself ought not to have been made a party; but Lord Alvanley, M. R. declared his opinion to be that he was not a necessary party; but as the reversionary interest appeared to have been sold for a very low price (1), he said, that before he decreed a specific performance of the contract, he would direct an inquiry into its value.

Doubtful if they can, where discovery only sought.

It is said by Lord Redesdale, that although a bankrupt, made a party to a bill against his assignees touching his estate, may demur to the relief, all his interests being transferred to his assignees, yet it seems to have been generally understood, that if any discovery is sought of his acts before he became a bankrupt, he must answer to that part of the bill for the sake of the discovery, and to assist the plaintiff in obtaining proof, though his answer cannot be read against his assignees, otherwise the bankruptcy might entirely defeat justice (c). Upon the same principle it seems also to have been considered, that where a person having had an interest in the subject of a bill has assigned the interest, he may yet be compelled to answer with respect to his own acts before the assignment (d) (2).

Considerable doubt, however, appears to be thrown upon the correctness of the rule which requires a bankrupt to answer for the sake of the discovery only, by the judgment of Sir Thos. Plumer, V. C. in Whitworth v. Davis before referred to (e), in which a bankrupt, who had been made a party to a bill for a specific performance of an agreement, demurred, his Honor, after disposing of the argument which had been urged to show that the bankrupt was properly made a party, in respect of the interest he had in the subject, on the ground that all legal and equitable interest in the property devolved upon the assignees, and that they only were necessary to sustain the case in point of interest, and therefore the bankrupt was not a necessary party, goes on to say; "The other ground alleged in support of the bill is more questionable, whether the bankrupt is not a proper party for the purpose of discovery and to sustain the injunction, if his answer affords ground for it. Samuel Romilly stated the practice to be, to make the bankrupt a party, with the view to read his answer, for the purpose of sustain-

(c) Lord Red. 133. (d) Ibid.

(e) 1 V. & B. 545.

⁽¹⁾ See Gwynne v. Henton, 1 Bro. C. C. (Perkins's ed.) 6, note (s), 10, note (c); Collet v. Wollaston, 3 ib. 228, note (b), and cases cited as to in-(2) See Story Eq. Pl. § 233, and note.

ing the injunction against his assignees; and that receives some In what cases authority from what is stated by Lord Redesdale. No authority is cited for that, but Lord Redesdale's judgment is confirmed by the Whether for intimation from the bar, of the current opinion that the bankrupt the purpose of discovery. may, for the purpose of discovery, be a party in a bill for an injunction. I have not been able to find a case that supports that opinion, but the knowledge that it is the received practice is sufficient to induce me not lightly to disturb it. There is certainly great convenience in this, as in such a case all the transaction may be known to the bankrupt alone, and the party seeking relief would be entirely deprived of it, as far as regards the injunction, if a discovery cannot be obtained from the only party having a knowledge of the transaction. There is, however, a difficulty, consistently with the rule and principle, to conceive how the bankrupt's answer can be read against his assignees, even for the purpose of an injunction, when clearly it could not be read against The case of Glassford v. Jeffrey, in the Court them at the hearing. of Exchequer, which was cited as an authority for reading the bankrupt's answer against his assignees, affords no assistance upon this point, all the assignees having put in distinct answers, craving leave to refer to the answer of the bankrupt and the schedules to that answer, not having any knowledge themselves upon the subject; in that instance, therefore, the bankrupt's answer was properly read against them. There is one direct authority that the bankrupt ought not to be made a party even for the purpose of discovery, Griffin v. Archer (g); the note is short, but I have inquired from the Judges who decided that case, and find the report of the decision, that the demurrer was allowed, is correct. The case of King v. Martin (h) does not bear upon the subject; the opinion of the Court being, that there might be relief against the bankrupt upon the fraud, who is stated expressly to be a material party against whom a decree might be made. There was another late case, Cooke v. Marsh (i), in which I understand, from general information only, that the demurrer was allowed; but I do not find distinctly that it was the demurrer of the bankrupt.

"The case standing thus, upon the authorities, how is it upon principle? The case of Fenton v. Hughes (k) lays down a broad principle that would exclude this bankrupt as a party; viz., that a person who has no interest, and is a mere witness, against whom

⁽g) 2 Anst. 478; cited 2 Ves. J. (i) In Chan. Trin. 1811. (k) 7 Ves. 287, [Sumner's ed. and (h) 2 Ves. J. 641. note (a).]

Defendants.

In what cases there could be no relief, ought not to be a party; a bankrupt stands in that situation, a competent witness, having no interest, against whom, therefore, no relief can be had at the hearing; he falls precisely within that general rule; and the cases of exception, stated by the Lord Chancellor, do not comprehend them. So, in the case of Le Texier v. The Margravine of Anspach (1), where the general rule is laid down, the case of a bankrupt is not stated as constituting an exception; the principle is certainly against making him a party; and the instance of exception put by the Lord Chancellor, in Fenton v. Hughes, is mentioned, not with approbation, but as standing upon authority only, having been introduced by Lord Talbot, not upon a very satisfactory principle. conclusion is therefore, that the bankrupt is within the principle, and is not one of the persons included in the exceptions. Therefore, upon principle, and the direct authority of the Court of Exchequer, opposed by no decision, this bankrupt ought not to be made a party even for the purpose of discovery. It is not however. necessary to decide that in this case, and merely stating the result of my inquiries, I desire not to be understood as opposing my opinion, though formed upon a consideration of the principle and authorities, to any current opinion prevailing as to the practice; this bill being framed with the view of considering the bankrupt as having such an interest that relief may be had against him, involving him in the charges with the other defendants, and praying relief generally against him, considered as a proper party against whom the prayer of relief ultimately may be sustained, he could not move for the costs as a defendant against whom discovery only is prayed, and no decree can be made. It is then perfectly clear, that relief being prayed against a defendant, who can be a party only for the purpose of discovery, he may demur upon that ground that relief is prayed against this bankrupt, when at all events a discovery only can be sought against him; it seems to me, that without determining the general question, this demurrer may be sustained."

If relief prayed

The decision of Sir Thomas Plumer, just quoted, still leaves it bankrupt may doubtful whether a bankrupt can be made a party to a bill against his assignees for the mere purpose of discovery and injunction; ery and relief. but there is no doubt that if he is made a party for the purpose of Unless where obtaining relief against him, he may demur to the bill, and that in charge of fraud such case his demurrer will protect him from the discovery as well

as the relief: where, however, fraud or collusion is charged between In what cases the bankrupt and his assignees, the bankrupt may be made a party, and he cannot demur, although relief be prayed against him. Thus, when a creditor, having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having by permission of the plaintiff possessed part of the goods taken in execution for the purpose of sale, and instead of paying the produce to the plaintiff had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interest and might be examined as a witness, was overruled (m).

Upon the same principle, where a man had been fraudulently induced by the drawer to accept bills of exchange without consideration, and the drawer afterwards endorsed them to others, upon a bill filed against the holder and drawer of the bill of exchange for a delivery up of the bill, and an injunction, the drawer pleaded his bankruptcy, which took place after the bill filed, in bar to the bill, and the Vice-Chancellor overruled the plea (u).

Where a defendant becomes bankrupt after the commencement Bankruptcy of of the suit, the bankruptcy is no abatement, and the plaintiff has abatement. his choice either to dismiss the bill and go in under the bankruptcy, or to go on with the suit, making the assignees parties by supplemental bill (o) (1). It seems that in Knox v. Brown (p) Lord Thurlow permitted the plaintiff to dismiss his own bill without costs, because it was by the act of the defendant himself that the object of the suit was gone. In a subsequent case, however, Rutherford v. Miller (q), the Court of Exchequer refused to make such an order without costs, and in Monteith v. Taylor (r), where a motion was made on behalf of the defendant, who had become bankrupt, to dismiss the plaintiff's bill with costs, for want of

⁽m) King v. Martin, 2 Ves. J. 641, [Sumner's ed. Mr. Hovenden's note at the end; cited, Lord Red. 132. (n) Mackworth v. Marshall, 3 Sim. 368.

⁽o) Monteith v. Taylor, 9 Ves. 615.
(p) 2 Bro. C. C. 186.
(q) 2 Anst. 458.
(r) 9 Ves. 615.

⁽¹⁾ Story Eq. Pl. § 342, and note; Sedgwick v. Cleveland, 7 Paige, 290. It is to be borne in mind, that there is a difference in reference to this point between cases of voluntary alienation and cases of involuntary alienation, as by insolvency or bankruptcy of the defendant. Story Eq. Pl. § 342, § 351, et seq. This distinction is fully discussed in Sedgwick v. Cleveland, 7 Paige, 290-292. See also note to Story Eq. Pl. § 342.

after Suit commenced.

prosecution. Lord Eldon, although he at first entertained a doubt whether he could make such an order with costs, afterwards expressed an opinion against the plaintiff upon that point, upon which the plaintiff submitted to give the usual undertaking to speed the cause.

Assignees Court by supplemental bill.

Death of assignee abates.

After what has been said, it is scarcely necessary to observe, that brought before where a party who is a defendant to a suit becomes bankrupt, or takes advantage of the Insolvent Debtors' Act, it will be necessary for the plaintiff, if he proceeds with the suit, to bring the assignees before the Court by a supplemental bill (1); and it has been decided, that where the assignee of an insolvent has been already before the Court as a defendant, and such assignee die or is removed, and a new assignee is appointed in his stead, the suit abates, and that the 26th section of the 7 Geo. IV. c. 57, applies only to cases where the assignee is plaintiff, and not to cases where he is a defendant (s).

> As a similar section occurs in the Bankrupt Act, 6 Geo. IV. c. 16, s. 7, it is presumed that a similar construction would be put upon it (t).

Evidence tacauses may be read against assignees; but not if examination took place after sued.

Where a bill has been filed against a defendant who afterwards ken in original becomes bankrupt, and a supplemental bill is in consequence filed against his assignees, the evidence taken in the original cause previously to the hankruptcy may be read at the hearing against the assignees; but where it appeared that some of the witnesses in the cause had been examined after the commission issued, and becommission is- fore the supplemental cause was at issue, the Vice-Chancellor allowed an objection to reading their depositions, but over-ruled it so far as it extended to the witnesses who had been previously examined (u).

Costs of assignees.

Although, on the death of an asssignee of an insolvent's estate, any creditor of the insolvent may get a new assignee appointed by the Insolvent Debtors' Court; and all the insolvent's property, which was vested in the deceased, will immediately thereupon become vested in the new assignee; yet where no new assignee has been appointed, a party having a demand against the insolvent, but not having proved under the insolvency, may sue the execu-

(s) Bainbridge v. Blair, Younge, E. R. 389; Mendham v. Robinson, 1 Mylne & Keene, 317; vide ante, p. 67; the provision of the act applies to the case of an official assignee, as well

as to that of a creditor's assignee; Lloyd v. Waring, 1 Coll. 536.

(t) Vide ante, p. 68.
(u) Hitchens v. Congreve, 4 Sim.

⁽¹⁾ Ante, 228, note; Sedgwick v. Cleveland, 7 Paige, 290, 291.

tors of the deceased assignee (z). It may here be observed, that Bankruptcy after some difference of opinion upon the subject, it has been determined, that in foreclosure suits, where assignees are made parties as defendants, in respect of the equity of redemption, they are not entitled to their costs from the plaintiff, even though they may have received no assets of the insolvent or bankrupt wherewith to pay them (y).

### SECTION XI.

# Persons Outlanced and Attainted, or Convicted of Treason or Felony.

IT is said that all persons disabled by Law to institute or main- In what cases tain a suit may, notwithstanding, be made defendants in a Court defendants. of Law, and cannot plead their own disabilities (z); and it is presumed that this rule would also be adopted in Courts of Equity, where the suit seeks to establish a pecuniary demand against the party; where however the proceeding is in rem, and a person under any of the disabilities alluded to is interested in the object of the suit, then it would seem that as the interest of the party is entirely vested in the Crown, the Attorney-general would be the proper defendant (a). Whether in such case the party himself should be joined, is a point which does not appear to have been determined, but it is submitted, that the rule before laid down, viz. that no person can be made a party to a suit against whom no relief can be prayed, will apply to this case as well as to that of bankrupts and insolvents.

(z) Fulcher v. Howell, 11 Sim. 100.

(y) Appleby v. Duke, 1 Ph. 273; Clarke v. Wilmot, 1 Ph. 276.

(z) Treatise on Star Chamber, part 3, sec. 6. (2 Collect Jurid. 140.) It is said in the above Treatise, that persons attainted of treason or felony are excepted out of this rule; but it has been decided in many cases, that a defendant cannot plead his own attainder to an action brought against him for debt or trespass. Banyster v. Trussell, Cro. Eliz. 516; Coke's Entries, 246, vide etiam, Ward and Prestall's cases, in 1 Leon. 329; and Vin.

Ab. Attainder, [B.] 3(a) Vide Balch v. Wastall, 1 P
Wms. 445; Hayward v. Fry, ib.,
Rex v. Fowler, Bunb. 38.

Defendants in forma pauperis

### SECTION XII.

### Paupers.

ALTHOUGH the stat. 11 Hen. VII. c. 12, before referred to, as that under which the practice of admitting parties to sue in forma pauperis originated, does not extend to defendants, and consequently a defendant in an action at Law is never allowed to defend it as a pauper (b); yet a greater degree of liberality is practised in Courts of Equity, and a defendant who is in a state of poverty, and as such incapable of defending a suit, may, as well as a plaintiff, obtain an order to defend in forma pauperis, upon making the same affidavit of poverty as that required to be made by a plaintiff (1). Indeed, originally the right of admission in forma pauperis appears to have been confined to defendants. By Lord Bacon's orders, it is said, "that any man shall be admitted to defend in forma pauperis upon oath, but for plaintiffs they are ordinarily to be referred to the Court of Requests or to the provincial counsels, if the case arise in the jurisdiction, or to some gentleman in the country, except it be in some special cases of commiseration or potency of the adverse party (c)."

The order admitting a party to sue or defend in forma pauperis, has not the effect of releasing him from costs ordered to be paid at the time of his admission, but the payment of such costs may be enforced in the usual manner. It may however be doubtful whether the admission may not have a retrospective effect upon costs incurred before the date of his admission; but concerning which, no order for taxation and payment has been made (d), but where a defendant had been committed for not answering, and had subsequently obtained permission to defend in forma pauperis, and thereupon had put in his answer, Sir J. L. Knight Bruce, V. C., ordered him to be discharged without payment of the costs of the contempt, considering the Court to have power to make such an order, either under its general authority independent of the

⁽b) 1 Tidd. 88.(c) Beames's Ord. 45.

⁽d) Davenport v. Davenport, 1 Ph. 124.

⁽¹⁾ Pickle v. Pickle, Halst. Dig. 177; M'Donough v. O'Flaherty, 1 Beat. 54.

A party will not be deprived of the privilege of defending himself in forms pauperis, on account of his misconduct. Murphy v. Oldis, 1 Hogan, 219.

stat. 11 Geo. IV. & 1 Will. IV. c. 36, or under that statute combined with its general authority (e).

Paupers.

To entitle a party to defend as a pauper, he must make the same affidavit as is required from a plaintiff applying to sue in that capacity; and it seems that if he is in possession of the property Not admitted in dispute, though it be ever so small, he cannot be admitted, or where in posif admitted, he may, upon the fact being afterwards shown to the erty in dispute. Court, be dispaneered (f). In this and in most other respects, the rules laid down with regard to persons suing in forma pauperis, are applicable to persons defending in that character; the only difference being in the form of application for admission, the petition for which, in the case of a defendant, is much shorter than in the case of a plaintiff, and is not required to contain any statement of the case. Nor is it necessary, in the case of a defendant, that the petition should be accompanied by any certificate of counsel (g).

session of prop-

#### SECTION XIII.

## Of Persons out of the Jurisdiction of the Court.

Where a suit affects the rights of persons out of the jurisdic- Where their tion, the Court will in some cases, where there are other parties interests incidental to those concerned, proceed against those other parties, and if the absent of others. persons are merely passive objects of the judgment of the Court, or their rights are incidental to those of the parties before the Court, a complete determination may be obtained without them (h) (1). Thus in Attorney-general at the relation of the

(f) Spencer v. Bryant, 11 Ves. 49;

(1) Story Eq. Pl. § 78, § 81, et seq.; Fell v. Brown, 2 Bro. C. C. (Perkins's ed.) 276, and notes; West v. Randall, 2 Mason, 190–198; Mallow v. Hinde, 12 Wheat. 193; Russell v. Clarke, 7 Cranch. 72; Lucas v. Bank of Darien, 2 Stewart, 280; Joy v. Wirtz, 1 Wash. C. C. 517.

"This ground of exception," says Mr. Justice Story, "is peculiarly applicable to suits in Equity in the Courts of the United States, which suits

⁽e) Bennett v. Chudleigh, 2 Y. & vide etiam, Prac. Reg. 321. C. 164. (g) 2 Harr. 390.(k) Lord Red. 25.

can be maintained in general only by and against citizens of different States. If, therefore, the rule as to parties were of universal operation, many suits in those courts would be incapable of being sustained therein, because all the proper or necessary parties might not be citizens of different States; so that the jurisdiction of the Court would be ousted by any attempt to join them. On this account it is a general rule in the Courts of the United States to dipense, if consistently with the merits of the case it can possibly be with all parties, over whom the Court would not possess jurisdiction."

Having incidental Interests.

University of Glasgow v. Baliol College (i), which was an information filed, impeaching a decree made in 1699, on a former information by the Attorney-general against the trustees of a testator, his heirs at law and others, to establish a will and charity created by it, alleging that the decree was contrary to the will, and that the University of Glasgow had not been made a party to the suit; Lord Hardwicke overruled the latter objection, as the University of Glasgow was a corporation out of the reach of the process of the Court, which circumstance warranted the proceedings without making that body party to the suit (k).

Joint debtors.

And so where a bill was filed for the recovery of a joint debt against one of two partners, the other being out of the kingdom, the question before the Court was, whether the defendant should pay the whole or only a moiety of the debt, and Lord Hardwicke was of opinion that he ought to pay the whole (1) (1). Upon the same principle a bill may be brought against one factor without his companion, if such companion be beyond sea (m); and where there were two executors, one of whom was beyond sea, and a bill was filed by a residuary legatee against the other to have an account of his own receipts and payments, the Court upon an objection being taken at the hearing, on the ground of the absence of the co-executor, allowed the cause to go on (n).

In the case of Smith v. The Hibernian Mine Company (o), Lord Redesdale says, "the ordinary practice of Courts of Equity, when one party is out of the jurisdiction and other parties within it, is, to charge the fact in the bill, that such a person is out of the jurisdiction, and then the Court proceeds against the other parties, notwithstanding he is not before it (2).

(i) Dec. 11, 1744. (k) Lord Red. 25 n. (g). (l) Darwent v. Walton, 2 Atk.

51Ò.

(o) 1 Sch. & Lef. 540; see also Cockburn v. Thompson, 16 Ves. 325; Waller v. Waller, 1 Vern. 428; Ro-

(m) Cowslad v. Cely, Prec. Ch. 83. v. Busby, 5 Beav. 193. (n) Ibid.

Eq. Pl. § 79; West v. Randall, 2 Mason, 196; Russell v. Clarke, 7 Cranch, 69, 98; Milligan v. Milledge, 3 Cranch, 220; Simms v. Guthrie, 9 Cranch, 19, 29; Elmendorf v. Taylor, 10 Wheat. 152; Mallow v. Hinde, 12 Wheat. 193; Harding v. Handy, 11 Wheat. 103; Ward v. Arredendo, 1 Paine, C. C. 413, 414. See the Act of Congress on this subject, passed Feb. 28, 1839, ch. 26, 51, by which an important alteration has been effected. The provisions 36, §1, by which an important alteration has been effected. The provisions of it are stated in the note to Story Eq. Pl. (3d ed.) § 79.

⁽¹⁾ Story Eq. Pl. § 82. This rule, that the Court can proceed to a decree against those parties, who are within the jurisdiction, must be taken with the qualification that it can be done without manifest injustice to the absent partner. Story Eq. Pl. § 78, § 82; Milligan v. Milledge, 3 Cranch, 220. (2) Story Eq. Pl. § 80.

The bill, however, should not only allege, that the person is out of the ju-

In bills of interpleader, also, a plaintiff may proceed with his Having incisuit and obtain an injunction against a party resident in this country, although the other parties claiming the property are out of the jurisdiction (p). In such cases, however, the plaintiff is bound In cases of to use prompt diligence to get the parties who are absent to come in and interplead with those who are present. If, however, he does not succeed in doing so within a reasonable time, the consequence is, that the party within the jurisdiction must have that which is represented to be the subject of competition, and the plaintiff must be indemnified against any proceeding being afterwards taken on the part of those who are out of the jurisdiction. "For this purpose, if the plaintiff can show that he has used all due diligence to bring persons out of the jurisdiction to contend with those who are within it, and they will not come, the Court upon that default, and their so abstaining from giving him an opportunity of relieving himself, would, if they afterwards came here and brought an action, order service on their attorney to be good service, and injoin that action for ever, not permitting those, who refused the plaintiff that justice, to commit that injustice against him " (q).

ests.

Upon the same ground it has been determined, that where a party to a bill of interpleader who has been served, will not appear, and stands out all the process of contempt, the bill may be taken pro confesso against him, and he will be decreed to interplead with the other defendants (r).

Where, however, the person who is out of the jurisdiction is one Where their whose interests are principally affected by the bill, the Court can-interests prinnot proceed in his absence, even though the parties having the ted, the Court legal estate, are before the Court (1); thus where a judgment-cannot proceed creditor, who had sued out an elegit upon his judgment, filed a sence. bill for equitable execution against real estates, which were vested in trustees upon certain trusts, the Court would not proceed with

cipally affec-

⁽p) Stevenson v. Anderson, 2 Ves. 412, n.; Cooper, 245, S. C. & B. 407. (r) Fairbrother v. Prattent, Dan. (q) Per Lord Eldon, 2 V. & B. 412. Exc. Rep. 64, and the decree, ib. 69, vide etiam, Martinius v. Holmuth, ib. n. (c).

risdiction, but it should go on to pray process against him, so that he may be made amenable to the process of the Court, if he should come within the jurisdiction. Ib.; Munoz v. De Tartel, 1 Beavan, 109; Brookes v. Burt, 1 Beavan, 109. The 22d rule of the Rules of the Supreme Court of the United

States assumes the propriety of this doctrine.
(1) Story Eq. Pl. § 81; Fell v. Brown, 2 Bro. C. C. (Perkins's ed.) 278, 279, notes; Joy v. Wirtz, 1 Wash. C. C. 517; Russell v. Clarke, 7 Cranch,

Having incidental interests

the cause, because the equitable tenant for life, subject to the trusts, was abroad (s). Upon the same principle it has been held, that bail cannot maintain an injunction against a creditor, who has recovered a verdict, where the principal debtor is out of the jurisdiction (t).

In a case, where a contract for the sale of an estate in the West Indies, had been entered into by a person who resided there, and had got into possession without paying the purchase-money, and a suit was instituted in this country by the vendor against the consignees appointed by the purchaser, Lord Lyndhurst refused to entertain a motion for a receiver of the proceeds of the consignments, on the ground that the purchaser, who was the principal defendant, was abroad, and had never been served with a subparae (u). Upon the same ground, Sir J. Leach, V. C., in Coward v. Chadwick (z), refused a motion by a second mortgagee for the appointment of a receiver where the mortgagor was out of the jurisdiction.

Appointment of receiver in absence of mortgagor.

With respect, however, to the appointment of a receiver, in the absence of the mortgagor, the practice has undergone considerable alteration in consequence of the decision of Lord Eldon, in Tanfield v. Irvine (y): in that case an application for a receiver had been made to Sir J. Leach, V. C., by the grantee of an annuity, which was secured by an equitable charge upon an estate. though the grantor had gone abroad and had not appeared to the suit, and the application was refused on the ground that the Court had not jurisdiction to deprive a man, who was not present, of the possession of his estate: but upon the motion being renewed before Lord Eldon, he made the order for a receiver, but guarding it, however, in such a way as not to prevent any person having a better title to the possession of the estate, from ousting him if they pleased. His Lordship observed, that he did not see why the rights of the equitable mortgagee were to be taken away, by the circumstances that the mortgagor had not entered an appearance, and could not be compelled to do so (1). The rights of a second mortgagee might be delayed to all eternity, if the residence of the mortgagor out of the jurisdiction were to have the effect which the Vice-Chancellor had given it (z).

(s) Browne v. Blount, 2 Russ. & M. 484.

M. 83.
(c) 2 Russ. 150, n.
(d) 2 Russ. 149.
(e) Stratton v. Davidson, 1 Russ.
(2) Vide the order made in this case,
(2) Russ. 152.

⁽¹⁾ See Fell v. Brown, 2 Bro. C. C. (Perkins's ed.) 278, 279, and notes.

It may also be observed, that by the 40th Order of August, Practice where 1841, the Court is expressly authorized, when a suit is defective amenable. for want of parties, and the defendant has not taken the objection by plea or answer, to make a decree, if it shall think fit, saving the rights of the absent parties (a).

It is usual, in cases where any of the persons who, if resident in In what cases this country, would be necessary parties to a suit are abroad, to made parties. make such persons defendants to the bill, charging the fact of their being abroad and praying that they may be served with process when they come within the jurisdiction (b): and although it appears to have been at one time, considered that the omission of their names in the prayer of process would not render the record defective (c), it has recently been determined that it is necessary to pray process against them, and that a bill which omits to do so is liable to demurrer (d) (1).

Where a party alleged in the bill to be out of the jurisdiction of Where process the Court, subsequently becomes amenable to it, he may, if pro- prayed. cess has been prayed against him, be served with such process. Where not prayed. If process has not been prayed against him, the bill must be amended for the purpose of praying it, if the state of the proceedings will admit of such amendment, if they will not, a supplemental bill must be filed against him (e). The most convenient course for the plaintiff to adopt in such cases seems to be, to allege in his bill that the defendant is out of the jurisdiction, and then to pray process against him in the ordinary manner. By this course, if the defendant come within the jurisdiction, no order is requisite to authorize process to issue against him (2). In Capel v. Butler, Where party where a party who was named as a defendant, but had never been appears volunserved with a subpæna, appeared by counsel at the hearing, and consented to be bound by the decree, the defect arising from his not having been served or answered was held to be cured (f).

In some cases, where a defendant has been abroad during the After decree. proceedings in a cause, he has been allowed to come in after a decree has been pronounced, and to have the benefit of it without the process of filing a supplemental bill: thus, in Banister v. Way

(a) See post, Ch. on Parties.
(b) Lord Red. 134.

⁽d) Taylor v. Fisher, Rolls, Sittings after Hill. T. 1835, MS.

e) Haddock v. Thomlinson, 2 S. & 8. 219.

⁽e) Lord Red. 134. (f) 28. & 8.457.

Ante, 234, note (2).
 See ante, 234, note (2).

subsequently amenable.

Practice where (g), after a decree pronounced establishing a will, and directing the necessary accounts, some of the residuary legatees, having been abroad, applied to have the benefit of the decree, submitting to be bound by it, and an order was made (they submitting to the decree), that they should be at liberty to enter their appearance by their clerks in Court, and that they should have the like benefit of the decree as if they had put in an answer, and had appeared at the hearing of the cause. A similar order was made by Lord Lyndhurst, after a cause had been heard upon further directions (A).

Order to be obtained after usual time. defendant abroad has not answered.

It is to be observed, that where a defendant is stated to be amend cannot abroad, and process is prayed against him when he shall come within the jurisdiction of the Court, he is not considered a party on ground that to the suit, (at least till he has been served with process,) for the determination of any point of practice arising between the plaintiff and the other defendants (i).

> It is stated in Lord Redesdale's Treatise on Pleading, that "when a person who ought to be a party is out of the jurisdiction of the Court, that fact being stated in the bill, and admitted by the defendants, or proved on the hearing, is in most cases a sufficient reason for not bringing him before the Court" (k) (1).

> In the case however of Egginton v. Burton (1), upon a bill by a creditor against the trustees under a deed of trust for the payment of debts, charging that the debtor and author of the trust was out of the jurisdiction, although the trustees admitted that fact, Sir J. Wigram, V. C., refused to act upon the admission, and gave the plaintiff liberty to exhibit interrogatories to prove it. There were not either infants or married women defendants in the cause, so that this decision would seem to establish that the fact of a defendant being out of the jurisdiction is one of the circumstances which the Court requires to be proved for its own satisfaction, previous to making a decree, notwithstanding no issue is raised upon the subject by the pleadings.

> Circumstances of this description are usually made the subject of a reference to the Master, and are not proved at the hearing. Thus in the case of a gift to children as a class, the Court does not make a decree affecting the property until satisfied by the Master's report, that all the members of the class are parties to the suit; and neither evidence nor admissions will be a reason for dis-

⁽g) 2 Dick. 687.
(i) King of Spain v. Hullett, 3 Sim.
(k) White v. Hall, 1 Russ. & M. 339. (k) Page 164.(l) 1 Hare, 448.

pensing with a reference upon the subject (m). There does not Practice where seem to be any other case, than that of a defendant being out of the jurisdiction, to which the Court throws upon the plaintiff the proof by evidence, at the hearing of a fact admitted by competent defendants.

amenable.

In Dibbs v. Goren (n), Lord Langdale, M. R., refused to make the fact of a defendant being out of the jurisdiction the subject of a reference to the Master, but gave leave to exhibit an interrogatory upon it.

Hughes v. Eades (o), was a creditor's suit, in which it was sought to charge the real estate of the debtor as well as the per-Some of the defendants were infants and married women, and no proof was given either of the debt, or of two of the parties interested in the real estate in remainder being out of the jurisdiction. Sir J. Wigram, V. C., was of opinion, that proof, on both of these facts, should have been given at the hearing, but he gave leave to exhibit interrogatories for the purpose of proving them.

There are different ways of serving a subpana upon persons out of the jurisdiction, which will be mentioned in the Chapter on Process; when service has been duly effected by any of the means therein mentioned, the cause is prosecuted against them in the ordinary manner.

⁽m) See post, page 264.(n) 1 Beav. 457.

⁽o) 1 Hare, 486.

## CHAPTER V.

## OF PARTIES TO A SUIT.

Section I. - Of necessary Parties, in respect of the Concurrence of their Interests with that of Plaintiff.

General Rule.

It is the constant aim of a Court of Equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation (a) (1). purpose, all persons materially interested in the subject, ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought by service upon them of a copy of the bill, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit (b) (2).

All having interest must be parties.

> In pointing out the application of this rule, I shall consider it firstly, with reference to those whose rights are concurrent with those of the party instituting the suit; and secondly, with reference to those who are interested in resisting the plaintiff's claim.

(a) Lord Red. 133.

(b) Orders, August, 1841, 23rd & 26th.

⁽¹⁾ Story Eq. Pl. § 72; Caldwell v. Taggart, 4 Peters, 190; West v. Randall, 2 Mason, 190-196; Joy v. Wirtz, 1 Wash. C. C. 517.

(2) Generally, all persons interested in the subject of a suit should be made parties, plaintiffs or defendants. Stephenson v. Austin, 3 Metcalf, 474, 480; Williams v. Russell, 19 Pick. 162, 165; Elderkin v. Shultz, 2 Blackf. 346; Gilman v. Cairns, 1 Breese, 124; Elston v. Blanchard, 2 Seam. 422; Greenup v. Porter, 3 Scam. 65; Scott v. Moore, 3 Scam. 315; West v. Randall, 2 Mason, 181; Caldwell v. Taggart, 4 Peters, 190; Crocker v. Higgins, 7 Conn. 342; Duncan v. Mizner, 4 J. J. Marsh. 447; Todd v. Sterrett, 6 J. J. Marsh. 432; Clark v. Long, 4 Rand. 451; Footman v. Pray, R. M. Charlt. 291; Watkins v. Washington, 2 Bland, 509; Hoxie v. Carr, 1 Sumner, 172; Whiting v. Bank of United States, 13 Peters, 6-14; Hopkirk v. Page, 2 Brock. 20; Hickock v. Scribner, 3 John. Cas. 311, 315; M'Connell v. M'Connell, 11 Vermont, 290; Noyes v. Sawyer, 3 ib. 160; Beardsley v. Knight, 10 ib. 185; Evans v. Chism, 18 Maine, 230; Willis v.

With respect to the first class, it is to be observed, that it is re- General Rule. quired in all cases where a party comes to a Court of Equity to All having a seek for that relief which the principles there acted upon entitle right to sue him to receive, that he should bring before the Court all such par-defendant for same thing. ties as are necessary to enable it to do complete justice; and that he should so far bind the rights of all persons interested in the subject, as to render the performance of the decree which he seeks perfectly safe to the party called upon to perform it, by preventing his being sued or molested again respecting the same matter either at Law or in Equity. For this purpose, formerly, it was necessary that he should bring regularly before the Court, either as co-plaintiffs with himself, or as defendants, all persons, so circumstanced, that unless their rights were bound by the decree of the Court, they might have caused future molestation or inconvenience to the party against whom the relief was sought.

But now, a plaintiff is enabled in many cases to avoid the expense of making such persons active parties to the cause, by obtaining leave from the Court, under the 23d Order, of August, 1841, to serve them with copies of the bill. The practice arising under this Order will be stated hereafter, for as it does not affect the principle, requiring all persons concurrently interested with the plaintiff, to be bound by the decree, but only substitutes, in some cases, an easier mode of accomplishing that end; it will be convenient, in the first instance, to consider what is the nature of those concurrent rights and interests, which render it necessary that the persons possessing them, should be made either active or passive parties to a suit.

In general, where a plaintiff has only an equitable right in the All having lething demanded, the person having the legal right to demand it, gal estate. should be a party to the suit (1): for, if he were not, his legal right would not be bound by decree (c), and he might, notwithstanding the success of the plaintiff, have it in his power to annoy

(c) Lord Red. 145.

Henderson, 4 Scam. 20; Spear v. Campbell, 4 Scam. 426; Herrington v. Hubbard, 1 Scam. 573.

The general rule, requiring all persons interested to be made parties to the suit, is confined to parties to the interest involved in the issue, and who must necessarily be affected by the decree. It is a rule of convenience merely, and may be dispensed with, when it becomes extremely difficult or inconvenient. Wendell v. Van Rensselaer, 1 John. Ch. 349; Story Eq. Pl. § 94, § 96; Hallett v. Hallett, 2 Paige, 15; Cullen v. Duke of Queensberry, 1 Bro. C. C. (Perkins's ed.) 101, and Mr. Belt's notes; Willis v. Henderson, 4 Scam. 20; Gilham v. Cairns, Breese, 124; Scott v. Moore, 3 Scam. 316. (1) See Johnson v. Rankin, 2 Bibb, 184; Neilson v. Churchill, 5 Dana, 341.

General Rule, the defendant by instituting proceedings to assert his right in an action of Law, to which the decree in Equity being res inter alies acta would be no answer, and the defendant would be obliged to resort to another proceeding in a Court of Equity, to restrain the plaintiff at Law from proceedings to enforce a demand which has been already satisfied under the decree in Equity. This complication of litigation it is against the principles of equity to permit, and it therefore requires that in every suit all the persons who have legal rights in the subject in dispute, as well as the persons having the equitable right, should be made parties to the proceedings.

Trustees.

Upon this ground it is, that in all suits by persons claiming under a trust, the trustee or other person in whom the legal estate is vested, is required to be a party to the proceeding (1). where an estate had been limited by a marriage settlement to a trustee and his heirs, upon trust during the lives of the plaintiff and his wife, to apply the profits to their use, with remainder to the children of the marriage, with remainder over; and a bill was brought by the persons interested under that settlement to set aside a former settlement, as obtained by fraud, it was held that the plaintiff could have no decree because the trustee was not a party (d); and where it appeared that a mortgage had been made to a trustee for the plaintiff, it was determined that the trustee was a necessary party to a suit to foreclose the equity of redemption (e) (2).

Whether trust expressed or implied.

Heir of mortgagee.

The rule is the same whether the trust be expressed or only implied, as where the executor of a mortgagee files a bill to foreclose a mortgage of freehold or copyhold estate, he should make the heir at law of the mortgagee a party (f) (3), because although according to the principles upon which the Courts of Equity proceed, money secured by mortgage is considered as part of the personal estate of the mortgagee, and belongs on his death to his personal representative; yet, as the legal estate is in the heir, he would not, unless he was before the Court when it was pronounced. be bound by the decree. There is another reason why it is necessary to bring the heir before the Court in a bill to foreclose a

⁽d) 9 Mod. 80 (f) Scott v. Nieholl, 3 Russ. 476. (e) Wood v. Williams, 4 Mad. 185.

Malin v. Malin, 2 John. Ch. 238; Fish v. Howland, 1 Paige, 20.
 Story Eq. Pl. § 201, § 209, and note.
 Story Eq. Pl. § 74, a., § 200, § 201; 4 Kent, (5th ed.) 186, and cases

mortgage, because if the mortgagee should think proper to re- Persons havdeem the estate under the decree, he will be a necessary party to ing legal estate the reconveyance (g). And so important is it considered in such a case that the heir should be a party, that where the mortgagee died without any heir that could be discovered, the Court restrained his executor from proceeding at Law to compel payment of the mortgage money, and ordered the money into Court till the heir could be found (h).

The heir, however, is only a necessary party where nothing has Not necessary been done by the mortgagee to affect the descent of the legal estate devised; tate upon him. If the descent of the legal estate has been diverted, it is necessary to have before the Court the person in whom it is actually vested (1); and therefore, where a mortgagee has devised his mortgage in such manner as to pass not only the money secured, but the legal estate in the property mortgaged, the devisee alone may foreclose without making the heir at law of the original mortgagee a party (i).

Upon the same principle, where a mortgagee in his lifetime ac- or assigned. tually assigns his whole interest in the mortgage, even though the assignment be made without the privity of the mortgagor, the assignee alone may foreclose without bringing the original mortgagee before the Court (k) (2); and where there have been several Last assignee mesne assignments of the mortgage, the last assignee, provided only necessary the legal estate is vested in him, will be sufficient without its being necessary to bring the intermediate ones before the Court (1). It Derivative is to be observed, however, that in order to justify the omission of mortgagees. the intermediate assignees in the case of an assignment of a mortgage, the conveyance must have been absolute, and not by way of mortgage (3); for if there be several derivative mortgagees, they must all be made parties to a bill of foreclosure by one of them.

(g) Wood v. Williams, 4 Mad. 196. (h) Schoole v. Sall, 1 Sch. & Lef. 177. The result of this case was, that after the cause had remained some years in Court, it was thought worth while to get an Act of Parliament to revest the estate, on an allegation that the heir could not be found. Vide etiam, Stoke v. Robson, 19 Ves. 385;

3 V. & B. 54; Smith v. Richnell, ib. notis; Schelmardine v. Harrop, 6 Mad. 39.

(i) Williams v. Day, 2 Ch. Ca. 32; Renvoise v. Cooper, Mad. & Geld.

(k) Chambers v. Goldwin, 9 Ves.

(1) Ibid.

⁽¹⁾ See Eagle Fire Ins. Co. v. Cammet, 2 Edw. 127.
(2) Story Eq. Pl. § 189; Bishop of Winchester v. Beavor, 3 Sumner's Vesey, 314, and note (a), and 315, 316; Whitney v. M'Kinney, 7 John. Ch.

⁽³⁾ Story Eq. Pl. § 191; Kittle v. Van Dyck, 1 Sandford, (N.Y.) 76, cited, post, sec. 2 of this chapter, in note to point, "mortgages unnecessary where mortgage is assigned.'

Persons having legal estate

Thus, where A. made a mortgage for a term of years for securing 350l. and interest to B., who had assigned the term to C., redeemable by himself on paying 300l. and interest; and B. died, and C. brought a bill against A. to foreclose him without making the representatives of B. the original mortgagee parties, it was held by the Court that there was plainly a want of proper parties (m) (1).

Covenantee in a suit for specific performance of covenant for benefit of another. The principle that requires a trustee or other owner of the legal estate to be brought before the Court in suits relating to trust property, applies equally to all cases where the legal right to sue for the thing demanded is outstanding in a different party from the one claiming the beneficial interest. Thus, where a bill is filed for the specific performance of a covenant under hand and seal of one, for the benefit of another, the covenantee must be a party to a bill by the person for whose benefit the covenant was intended, against the covenantor (n) (2). And so in Cope v. Parry (v), which was a bill filed for the specific performance of a covenant for the surrender of a copyhold estate to A., in trust for others, Lord Chief Baron Richards said, that as the effect of a surrender, if the Court decreed it, would be to give the legal estate to A., he ought to be a party, otherwise another suit might become necessary against him.

Principle of rule as to covenantee.

The principle upon which Courts of Equity act in cases of this description, is illustrated by a decision of the Court of C. B., in the case of Rolls v. Yate (p) (3). In that case, A. by inden-

(m) Hobart v. Abbot, 2 P. Wms. (e) 2 J. & W. 538. (p) Yelv. 177; 1 Bulstrode, 25, b. (n) Cooke v. Cooke, 2 Vern. 36; 2 S. C. Eq. Ca. Ab 73.

544; 4 Kent, (5th ed.) 184, 185.
(2) Story Eq. Pl. § 209.
(3) See Mr. Metcalf's note (1), to the case of Rolls v. Yate, in his edition of Yelverton, p. 177.

⁽¹⁾ Kittle v. Van Dyck, 1 Sandford, (N. Y.) 76.

The general, although not universal rule, is that all incumbrancers, as well as the mortgagor, should be made parties, if not indispensable, at least, as proper parties to a bill of foreclosure, whether they are prior or subsequent incumbrancers. Story Eq. Pl. § 193, and cases cited; Findley v. Bank of United States, 11 Wheat. 304; Haines v. Beach, 3 John. Ch. 459; Emworth v. Lambert, 4 John. Ch. 605; McGown v. Yorks, 6 John. Ch. 450; Bishop of Winchester v. Beavor, 3 Sumner's Vessey, 314, note (a); Tait v. Pallas, 1 Hogan, 261; Bodkin v. Fitzpatrick, 1 Hogan, 308; Canby v. Ridgeway, Halst. N. J. Dig. 168; Lyon v. Sandford, 5 Conn. 544; Renwick v. Macomb, 1 Hopk. 277; Fell v. Brown, 2 Bro. C. C. (Perkins's ed.) 276, 279, notes; Maderias v. Cutlett, 7 Monroe, 476; Wing v. Davis, 7 Greenl. 31; Poston v. Eubank, 3 J. J. Marsh. 44; Stucker v. Stucker, 3 J. J. Marsh. 301; Cooper v. Martin, 1 Dana, 25; Noyes v. Sawyer, 3 Vermoat, 160; Judson v. Emanuel, 1 Alabama, N. S. 598; Miller v. Kershaw, 1 Bailey Eq. 479; Bristol v. Morgan, 3 Edw. 142; Nodine v. Greenfield, 7 Paige, 544; 4 Kent, (5th ed.) 184, 185.

ture had covenanted with B. and C., that he A. would enter into Persons hava bond to pay B. a sum of money on a certain day. B. died, and ing legal right his administrator brought an action of covenant against A. for the money, and it was adjudged that it did not lie, for although the money was to be paid to B. who was dead, yet as the covenant was to B. and C. jointly, C. who survived, being the party to the indenture, ought to have sued. Now, supposing that instead of bringing an action of covenant on the indenture, B.'s representative, who was the party entitled to the money, had filed a bill in Equity against A. for the payment, and had obtained a decree, it is clear that such a decree would not have protected 'A. against C.'s right to bring an action on the covenant, for a decree in equity for A. to pay a sum of money to B's representatives never could have been made use of in answer to an action brought against A. by C. as surviving covenantee in a covenant to B. and C. (a). The rule of pleading at Law in cases of breaches of covenant, appears to be that performance of a covenant must be pleaded in the terms of the covenant (r), and the evidence to support such plea must be confined to those points which are put in issue under it (s): so that in the case above put, an action by C. against A. for non-performance of the covenant could not have been answered by showing payment of the money to the representative of B. must, therefore, in order to have protected himself against the action of C., have filed another bill in Equity against him, to which B.'s representatives must have been a party, in order to obtain an injunction to restrain him from proceeding in the action.

It is to be observed, that the preceding cases arose upon cove- Rule not exnants formally entered into under hand and seal; the same rule sons contractwill not however apply to less formal instruments, such as ordinary ing not under agreements not under seal, where one party contracts as agent for seal, for bene-fit of another; the benefit of another. In such cases, it is not necessary to bring the agent before the Court, because, even at Law, it is the un-nor to cases of doubted right of the principal to interpose and supersede the right agreements by of his agent by claiming to have the contract performed to himself, although made in the name of his agent (1). This principle

held, that no action will lie in the name of the principal, on a written con-

 ⁽q) 1 Inst. 292, b.
 (r) Scudamore v. Stratton, 1 Bos. & Pull. 455. (s) Littler v. Holland, 3 T. R. 590.

⁽¹⁾ The party in interest in a contract, resting in parol, may sue upon it. Lapham v. Green, 9 Vermont, 407; Story Agency, § 418, et seq. Pitts v. Mower, 18 Maine, 361; Edmond v. Caldwell, 15 Maine, 340; Higdon v. Thomas, 1 Har. & Gill, 153; White v. Owen, 12 Vermont, 361.

In the case of the United States v. Parmele, 1 Paine, C. C. 252, it was

Persons having legal right to sue.

was acted upon by the Court of Queen's Bench, in the case of the Duke of Norfolk v. Worthy (t), and in Bethune v. Farebrother (u), where the plaintiff not wishing to appear as purchaser, procured J. S. to bargain for him, who signed the contract (not as agent) and paid the deposit by his own cheque; yet, inasmuch as it was the plaintiff's money, he was allowed to maintain an action for it without showing any disclaimer by J. S. Upon the same principle, in Equity, if the plaintiff had filed a bill against the vendor, for a specific performance, he would not have been under the necessity of making J. S. a party to the suit, because, if he had succeeded in his object, performance of the contract to the plaintiff might have been shown in answer to an action at Law by J. S., whose title was merely that of agent to the plaintiff. It is, however, frequently the practice to join the auctioneer as co-plaintiff with the vendor in suits for specific performance of contracts entered into at auctions, but that is, because he has an interest in the contract, and may maintain an action upon it. He has also an interest in being protected against the legal liability which he may have incurred in an action by the purchaser to recover the deposit.

Where agency established by evidence:

appears in contract.

It is to be observed, that in order to enable the plaintiff to dispense with the necessity for making the agent entering into a contract for his employer, in his own name, a party to a suit to enforce such contract, he must state in his bill, and be in a situation to show by evidence, that he was actually an agent in the transaction, as appears to have been done in the case of Bethune v. Farebrother (y), by proving that although the money was paid by the cheque of the agent, it was in fact the money of the purchaser. The Where agency fact of the person contracting being the agent of the plaintiff may likewise appear from the contract itself; but if it does not appear from the contract itself, and the plaintiff is not in a situation to show the agency, by proving that the money was his own, or some act tantamount, he must make the agent a party either as co-plaintiff with himself or as a defendant, in order to bind his interest, for otherwise such agent would have a right to sue either in equity

- (t) 1 Camp. N. P. c. 337. (u) Cited 5 M. & S. 385.
- (y) Cited, 5 M. & S. 385.

tract made by his agent in his own name, although the defendant may have known the agent's character. See Clarke v. Wilson, 3 Wash. C. C. 560.

This, however, is not universally true, as appears in the case of factors making written contracts in their own name for the purchase or sale of goods for their principals. So in cases of agents procuring policies of insurance in their own names, for the benefit of their principals, and in other cases, which will be found commented on in Story Agency, § 161.

for a specific performance of the same contract, or to bring an ac- Persons havtion at Law for the recovery of the money paid to the defendant; ing legal right and parol evidence on the part of the defendant would in either case be inadmissible to show, in opposition to the written contract, In what cases that the purchase was made on behalf of another (z) (1). The necessary parsame rule will apply if the agent contracted as well on his own be-tyhalf as in the capacity of agent for another. In that event the bill must be filed in his own name, and in that of the person on whose behalf he acted, or at least such person must be a party to the suit; and upon this principle, in Small v. Attwood (a), where a contract was entered into for the purchase of an estate by certain persons in their own names, but in fact on their own account, and also as agents for other parties, a bill to rescind the contract was filed in the names both of the agents, and of the other parties for whom they contracted.

With respect to the effect of a sub-contract in rendering it necessary to bring the party concerned in it before the Court in a litigation between the original contracting parties, the following dis- Persons entitinction has been made, viz., if A. contracts with B. to convey to contract. him an estate, and B. afterwards contracts with C, that he, B. will convey to him the same estate, in that case C. is not a necessary party to a suit between A, and B, for a specific performance; but if the contract entered into by B. with C. had been, not that he, B., should convey the estate, but that A, the original vendor should convey it to C., then C. would have been a necessary party to a suit by B. against A. for a specific performance (b).

Upon the principle above stated, it is presumed, that where a man enters into a contract which is expressed in the instrument itself to have been entered into by him as agent for another, he would not afterwards be allowed to sue for a performance of that contract on his own behalf, on the allegation that he was not authorized to act as agent, without bringing the party, on whose behalf it was expressed to be made, before the Court. At Law it has been held, that a plaintiff under such circumstances could maintain an action, by procuring from the party on whose behalf he appeared to have entertained the contract, a renunciation of his interest (c).

(z) Bartlett v. Pickersgill, 1 Cox, 203; and the cases there quoted; and 15; 1 Eden, 515. see post. see post.
(c) Bickerton v. Burrell, 5 M. & S. 383. (a) 1 Young, 407. (b) — v. Walford, 4 Russ. 372;

and Nelthorpe v. Holgate, 1 Coll.

⁽¹⁾ See 3 Sugden Vend. & Purch. (6th Am. ed.) 260, and notes; Botsford v. Burr, 2 John. Ch. 409; Hughes v. More, 7 Cranch, 176.

Persons having legal right to sue.

Agent having no interest not a party.

It is to be observed here, that although an agent entering into a contract in his own name, may be joined in a suit as co-plaintiff with his principal, as in the case before referred to of an auctioneer, who is frequently joined with the vendor in a bill against a purchaser, because he has an interest in the contract, or may bring an action upon it, it is merely on the ground of the interest which he has in the contract, and that the rule is indisputable, that wherever an agent has no interest whatever in the property in litigation, or in the contract, and cannot be sued either at Law or in Equity respecting it, in such case he ought not to be made a party; and that if he is made a co-plaintiff in the suit, a demurrer upon that ground will be allowed (d). Upon this principle it has been held in the Court of Chancery, that an agent who bids at an auction for an estate, and signs the memorandum in his own name, need not be made a co-defendant with his employer in a bill for a specific performance of such agreement (e).

Assigner of a or his representative.

Where the subject-matter in litigation is a legal chose in action chose in action, which has been the subject of assignment, the assignor, or if dead, his personal representative, should be a party (1); for as an as-

> (d) King of Spain v. Machado, 4 Russell, 228; vide etiam, Cuff v. Platell, ib. 242, and Makepeace v. Haythorne, ib. 244.

(e) Kingsley v. Young, Rolls, July 30, 1807, Coo. Eq. Pl. 42. Vide etiam, Lissett v. Reave, 2 Atk. 394; Newman v. Godfrey, 2 Bro. C. C. 332, cited Lord Red. 130.

(1) Corbin v. Emmerson, 10 Leigh, 663; Bell v. Shrock, 2 B. Monroe, 29; Combs v. Tarlton, ib. 194; Gatewood v. Rucker, 1 Monroe, 22; Sanders v. Mucey, 4 Bibb, 458; Allen v. Crocket, 4 Bibb, 240; Bromley v.

Holland, 7 Summer's Vesey, 3, note (c).

In Trecothick v. Austin, 4 Mason, 16, 41, et seq., it was strenuously maintained by Mr. Justice Story, that the assignor in a chose in action is not, in Equity, a necessary party, where the suit is by the assignee and the assignment is absolute. In Hobart v. Andrews, 21 Pick. 526, 531, 532, Mr. Lystice Wilde, seems to be inclined to favor the same doctrine. In Story Eq. Pl. § 153, the law on this subject is thus stated: "In general, the person, having the legal title in the subject matter of the bill, must be a party, either as plainiff or as defendant, though he has no beneficial interest therein; so that the legal right may be bound by the decree of the Court. In cases, therefore, where an assignment does not pass the legal title, but only the equitable title to the property, as, for example, an assignment of a chose in action, it is usual, if it be not always indispersable, to make the assignor, holding the legal title, a party to the suit. Indeed the rule is often laid down far more broadly, and in terms importing, that the assignor, as the legal owner, must in all cases be made a party, where the equitable interest only is passed. Thus it has been laid down in a book of very high authority, that if a bond or judgment be assigned the assignor, as well as the assignee, must be a party; for the legal right remains in the assignor. But it may perhaps be doubted, whether the detrine thus stated is universally true. The true principle would seem to be, that in all cases, where the assignment is absolute and unconditional, leaving no equitable interest whatever in the assignor, and the extent and validity of the assignment is not doubted or denied, and there is no remaining liability

signment of a chose in action is not recognized in a Court of Law, Persons havand is only considered good in Equity, the recovery in Equity by the ing legal right assignee would be no answer to an action at Law by the assignor, in whom the legal right to sue still remains, and who might exercise it to the prejudice of the party liable; in which case the party liable would be driven to the circuitous process of filing another bill against the plaintiff at Law, for the purpose of restraining his proceedings (1).

in the assignor to be affected by the decree, it is not necessary to make the latter a party. At most, he is merely a nominal or formal party in such a case. It is a very different question, whether he may not properly be made a party, as the legal owner, although no decree is sought against him; for in many cases a person may be made a party, though he is not indispensable. But where the assignment is not absolute and unconditional, or the extent or validity of the assignment is disputed or denied, or there are remaining rights valuity of the assignment is disputed or denied, or there are remaining against or liabilities of the assignor, which may be affected by the decree, there he is not only a proper, but a necessary party." See Miller v. Bear, 3 Paige, 466; Craig v. Johnson, 3 J. J. Marsh 573; 2 Story Eq. Jur. § 1057.

In Field v. Maghee, 5 Paige, 539, it was held, that the assignee of a chose in action, which has been absolutely assigned, is not authorised to file a bill

for the recovery of the same, in the name of the assignor. See also Rogers v. Traders Ins. Co., 6 Paige, 583; Miller v. Bear, 3 Paige, 467, 468; Whitney v. M'Kinney, 7 John. Ch. 144; Sedgwick v. Cleveland, 7 Paige, 287; Polk v. Gallant, 2 Dev. & Bat. Eq. 395; Snelling v. Boyd, 5 Monroe, 172. It has been recently held in England in the case of Hammond v. Messen

ger, 9 Simons, 327, that the assignee of a debt, not in itself negotiable, is not entitled to sue the debtor, for it in Equity, unless some circumstances intervene, which show that his remedy at law is, or may be obstructed by the assignor. See 2 Story Eq. Eq. Jur. § 1057 a. and note; Story Eq. Pl § 153, and note.

It is remarked by Mr. Justice Story, that "this doctrine is apparently new; and never has been adopted in America. The general principle here established seems to be, that wherever an assignee has an equitable right or interest in a debt, or other property, (as the assignee of a debt certainly has) there, a Court of Equity is the proper forum to enforce it, and he is not to be driven to any circuity by instituting a suit at law in the name of the person, who is possessed of the right." 2 Story Eq. Jur. § 1057 a.

It may well be worthy of consideration whether the doctrine in the case

of Hammond v. Messenger, ubi supra, is not founded in better reason, than that which is above stated as the American doctrine, if by the American doctrine we are to understand, that the mere assignment of a debt will give the assignee a right to sue in Equity, when the assignor could only pursue his remedy at law. See Carter v. United Ins. Co. 1 John. Ch. 463. The doctrine of the case of Hammond v. Messenger, is simply, that a debt not otherwise properly a subject of Equity cognizance does not become such merely because it has been assigned, and the assignee is compelled to sue at law in the name of the assignor.

(1) But generally speaking, an assignee under a voluntary assignment pen dents lite, need not be made a party to a bill, or be brought before the Court. Story Eq. Pl. § 156, § 351; 1 Story Eq. Jur. § 406; Sedgwick v. Cleveland, 7 Paige, 287; Van Hook v. Throckmorton, 8 Paige, 33; Cook v. Mancius, 5 John. Ch. 93; Murray v. Barlow, 1 John. Ch. 577, 581; Murray v. Lylburn, 2 John. Ch. 441, 445; 2 Story Eq. Jur. § 908; Hoxie v. Carr, 1 Sumner, 173. It is, however, otherwise where the assignment is by operation of law as in cases of hankungton or assignments under the insolvent ation of law, as in cases of bankruptcy, or assignments under the insolvent acts. Sedgwick v. Cleveland, 7 Paige, 288; Deas v. Thorne, 3 John. 543; Story Eq. Pl. § 342, note, § 351, note; Storm v. Davenport, 1 Sandford Ch. 135. And an assignee under a voluntary assignment may be made a party, when desirable, at the election of the plaintiff. Story Eq. Pl. 156, and cases in note.

Upon this ground, where an obligee had assigned over a bond,

and died, and the assignee sued for it in Equity, the cause was di-

rected to stand over to make the personal representative of the

Persons having legal right to sue.

Obligee in a bond; or his representative.

judgment.

obligee a party (f) (1); and in another case (g), where the assignor of a bond was dead, and there was not a representative, it was held, on a bill filed by the assignee against the obligor for a ne exeat, that there was a want of parties. And in like manner, where a bill was filed by the assignees of a judgment, without the assignor being a party, it was held, that the plaintiffs could not go on with that part of their case which sought payment of the debt (k) (2).

Assignor of shares in an unincorporated joint stock company. For the same reason, where a bill was filed against the directors of an unincorporated joint-stock company by a holder of shares, of which some were original, and some were alleged to be derivative, without stating with respect to the derivation of them, the manner in which he had become possessed of them, or whether they had been transferred to him, in the manner in which, according to the regulations of the company, such transfer ought to have been made, Lord Brougham appeared to think that the persons by whom the shares had been assigned to the plaintiffs ought to have been parties to the suit (i).

Lessor of tithes by parol.

The same principle appears to have been acted upon by the Court of Exchequer, in certain cases in which bills have been filed for tithes by lessees, under parol demises (which in consequence of tithes being things lying in grant, are void at Law), in which cases, upon demurrers being put in and submitted to, the Court has permitted the plaintiffs to amend their bills by making the lessors parties to the suit (k). In a recent case of this nature, where an objection to a bill for tithes by a lessee claiming under this description of demise, was taken at the hearing, Lord Lyndhurst, L. C. B., considered that the objection was valid, and would have allowed it but for the circumstance that the plaintiff had originally made the impropriators, who were the lessors, defendants

⁽f) Brace v. Harrington, 2 Atk.
235.

(g) Ray v. Fenwick, 3 Bro. C. C.
26.

(k) Catheart v. Lewis, 1 Ves. J.
463.

(i) Walburn v. Ingilby, 1 M. & K.
61.

(k) Henning v. Willis, 3 Wood.
29; Jackson v. Benson, M*Lel. 62.

⁽¹⁾ Coale v. Mildred, 3 Har. & John. 278. See Ensign v. Kellogg, 4 Pick. 1.

⁽²⁾ M'Kinnie v. Rutherford, 1 Dev. & Bat. Eq. 395; Elliott v. Waring, 5 Monroe, 339; Pemberton v. Riddle, ib. 401; Young v. Rodes, ib. 500; Elderkin v. Shultz, 2 Blackf. 346.

to the suit; but in consequence of their having put in a disclaimer, Persons having legal right had, previously to the hearing, dismissed the bill as against them.

It may be observed here, that although the assignor of a chose in action is sometimes made a party defendant to a suit, yet the more chose in action general practice is, (especially where the assignment contains, as generally coit almost always does, a power of attorney from the assignor to the plaintiff. assignee to sue in his name,) to make the assignee a co-plaintiff in the bill; although it seems, that even if the assignment is stated upon the bill, and consequently that there is an admission of the fact as between the co-plaintiffs, still it is necessary to prove the assignment in order to show that there is no misjoinder of plaintiff's (!) (1).

Upon the principle above laid down, it is held that although a Personal repcreditor or legatee of a person deceased may in some cases, under resentative. peculiar circumstances, such as an allegation of fraud or collusion (2), bring a bill against a debtor to the estate, for the purpose of augmenting the fund (m), yet such a suit can in no case be maintained without the personal representative being a party (n). And where a legatee of a term of years sued for it, it was held that he must make the executor a party, although he alleged that he had his assent (o). And so, although an executor has actually released his interest in the property sued for, it has been held that he must nevertheless be a party to the suit (p).

Where a testator having been resident in India, where all his Where no repproperty was, died there, having made a will, whereby he bequeath- resentative in ed the residue of his estate to persons resident in this country, but England. appointed persons in India his executors, who proved the will there, and remitted the proceeds to their agent in this country, it was held, that the residuary legatees could not maintain a suit

- (1) Sayer v. Wagstaff, 2 T. & C. 230; Cholmondeley v. Clinton, 4 Bligh, 123; Ryan v. Anderson, 3 Madd. 174.
- (m) Attorney-general v. Wynne, Mos. 126; Wilson v. Moore, 1 Mylne & K. 126; vie etiam, where this has been done in cases of partnership, Bowsher v. Watkins, 1 R. & M. 277.
- (n) Rumney v. Maud, Rep. temp. Finch, 336; Griffith v. Bateman, ib. 334; Attorney-general v. Twisden, ib. 336; Conway v. Stroud, 2 Freem.
- (e) Moore v. Blagrave, 1 Ch. Ca.
  - (p) Smithby v. Stinton, 1 Ver. 31.

(2) Gregory v. Forrester, 1 M'Cord, Ch. 325; post, ch. 6, sec. 4, and cases cited in notes to this point.

⁽¹⁾ In every case of a bill in Equity, asking relief for a plaintiff as assignee of the rights of another, the assignee must be made a party, and the assignment ought to be shown and proved, though not denied, nor proof of it called for in the answers. Corbin v. Emerson, 10 Leigh. 663; Smith v. Harley, 8 Missouri, 559, 560.

Persons having legal right to sue.

Limited administration out.

against the agent without having a representative to the testator in England before the Court (q) (1). It is to be observed, that in this and all other cases where a

claim on property in dispute would vest in the personal representamust be taken tive of a deceased person, and there is no general personal representative of that person, an administration limited to the subject of the suit will be necessary to enable the Court to proceed to a decision on the claim; and when a right is clearly vested, as in a trust term which is required to be assigned, an administration of the effects of the deceased trustee, limited to the trust term, is necessary to warrant the decree of the Court for an assignment of the term (r). In some cases, however, when it has happened at the hearing of a cause that the personal representative of a deceased person, not a party to the suit, ought to be privy to the proceedings under a decree, but that no question could arise as to the rights of such representative; the Court has, on the hearing, made a decree directing proceedings before one of the Masters of the Court, without requiring the representative to be made a party by amendment or otherwise; and has given leave to the parties in the suit to bring a representative before the Master, on taking the accounts or other proceedings directed by the decree, which may concern the rights of such representative; and a representative thus brought before the Master is considered as a party to the cause

In what case personal representative dispensed with,

leave given to bring one before the Master.

Where executor abroad special administration granted, under 38 Geo. III. c. 87.

in the subsequent proceedings (s). It should be noticed here, that by an Act of Parliament passed in the 38 Geo. III. c. 87, intituled "An Act to facilitate the distribution of assets in cases where the person to whom probate is granted is out of the realm," at the expiration of twelve calendar months from the death of any testator, if the executor to whom probate has been granted is then residing out of the jurisdiction of the Courts of Law or Equity. The Ecclesiastical Court which granted probate of the will, may, upon the application of any creditor, next of kin or legatee, grant a special administration as limited "for the purpose to become and be made a party to a bill or bills to be exhibited against him in any of his Majesty's Courts of Equity, and to carry the decree or decrees of any of the said Courts

(q) Logan v. Fairlie, 2 S. & S. 284. (r) Lord Red. 177. (s) Lord Red. 179.

⁽¹⁾ Story Conf. Laws, § 513, and numerous cases cited in notes, § 514 b.; Stòry Eq. Pl. § 179.

Executors residing abroad, or who have never acted on the estate, are not necessarily made parties to the suit. Clifton v. Haig, 4 Desaus. 330; Story Eq. Pl. § 179.

into effect, and not further or otherwise. By the fourth section of Persons havthe same Act, "the Court of Equity in which suit shall be de- ing legal right pending, may appoint (if it shall be needful) any person or persons to collect in any outstanding debts or effects due to such es-And a receiver tate, and to give discharges for the same; such persons or person giving security, in the usual manner, duly to account for the same." Moreover the Accountant-general of the High Court of Chancery, Stock may be or the secretary or deputy secretary of the Governor and Company transferred inof the Bank of England, are enabled to transfer, and the Governor countant-genand Company of the Bank of England to suffer a transfer to be eral, made, of any stock belonging to the estate of such deceased person, in the name of the Accountant-general, in trust for such pur- in any suit to poses as the Court shall direct, in any suit in which the person to which limited administrator whom such administration hath been granted shall be or may have a party. been a party; provided, nevertheless, that if the executors or execu- Executor comtor, capable of acting as such, shall return to and reside within the ju- ing within jurisdiction of any of the said Courts pending such suit, such executors be made a or executor shall be made party to such suit; and the costs incurred party. by granting such administration, and by proceeding in such suit against such administrator, shall be paid by such person or persons, or out of such fund, as the Court, where such suit is depending, shall direct. Where an infant is sole executor, administration with Where sole exthe will annexed must be granted to the guardian of such infant, ecutor an infant, fant special ador to such other person as the Spiritual Court shall think fit, until ministration such infant shall have attained the full age of twenty-one years, at granted. which period, and not before, probate of the will shall be granted to him. And the person to whom such administration shall be granted shall have the same powers vested in him as an administrator now hath by virtue of an administration granted to him durante minore ætate of the next of kin.

It is to be observed, that the rule which requires that the trus- In what cases tees, or other persons having the legal estate in the thing demand-pensed with. ed, should in all cases be before the Court, has, as we have seen, been adopted on account of the impossibility of otherwise preven- Where no leting the assertion of the legal right in Courts of Law for in some gal estate. cases, where the trustee had had no beneficial interest in the property, and was not possessed of a legal estate which he could set up at law to the annoyance of the defendant in equity, the Court has permitted bills to be filed by the cestui que trusts without making such trustee a party, the cestui que trusts undertaking for him that he shall conform to such decree as the Court shall make (t). Thus

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⁽t) Kirk v. Clark, Prec. in Ch. 275.

where a bill was filed to carry the trusts of a will into execution,

whereby, amongst other things, lands were limited to trustees for

a term of years, to raise a sum of money by way of portions for

Persons having legal right to sue.

Intermediate trustees of equitable interests.

Deposited of deeds.

Assignor of equitable in-

terest.

younger children, two of which younger children had assigned their shares of the sum to be raised to a trustee for the benefit of the others, but which last trustee was not before the Court: the only question was, whether he ought to be a party to the suit; and the Court was of opinion, that as the trustees of the term who had the legal estate, and all the children who had the beneficial interest, were parties, there was no occasion to make the other trustee a party (u). Upon the same principle, where a man had executed a deed, providing, in case of his death, for a certain person and her children, and had deposited it in the hands of an attorney for the benefit of all parties, but afterwards procured possession of it himself, it was held, on demurrer, that the woman and her children could maintain a suit to compel him to deliver up the deed, without making the attorney with whom it was deposited and against whom no breach of trust was alleged, a party (x). For the same reason it has been held, that although, as we have

seen, the assignor of a chose in action is a necessary party to a suit by the assignee, yet the assignee of an equitable interest in the nature of a chose in action may maintain a suit for the assertion of that interest without bringing the assignor before the Court. where one of two joint executors and residuary legatees assigned his share of the residue and died, and afterwards his assignee brought a bill against the other executor for his share of the residue, the Court of Exchequer held that the representatives of the assignor were not necessary parties, as the proof of the receipt of the purchase-money by the assignor would be sufficient evidence of the plaintiff's title (v).

Original lessee in suits by lessignee of lease.

The principle of the Court, that the person having the legal right to sue for the matter which he might enforce at Law against the sor against as- defendant, should be before the Court at the time of its pronouncing its decision, applies to all persons who have legal demands against the defendant arising out of the same matter; thus, as it has been decided that at Law an assignee of a lease may be sued for non-performance of the covenants both by the lessor and the original lessee from whom he derives title, Courts of Equity will not permit either the lessor or lessee to institute proceedings against him in respect of his covenants, without having the other

⁽u) Head v. Lord Teynham, 1 Cox,

 ⁽x) Knye v. Moore, 1 S. & S. 61.
 (y) Blake v. Jones, 3 Anst. 651.

to sue.

before them, in order that the rights of both may be settled at the Persons hav-Upon this ground, where a man granted a lease of ing legal right houses for thirty years to B., who covenanted to keep them in good repair, and died, having bequeathed the term to his wife; and afterwards, by mesne assignments, the term became vested in a pauper, but the houses becoming out of repair and the rent in arrear, a bill was brought by the lessor against the assignee for repairs, and an account of the arrears of rent; upon an objection being taken, that the executors of the original lessee were not parties, the Lord Chancellor said, that to make the proceedings unexceptionable, it would be very proper to have them before the Court; for that it did not appear to him but that the plaintiff might have had a satisfaction at law against the executors, and, if so, the plaintiff's equity will be their equity (z). The same objection was allowed in the case of the City of London v. Richmond (a), which was also the case of a bill against the assignee of a lease for payment of rent and performance of covenants.

It is to be observed here, that the rule which requires all per- Drawer or prisons having similar rights to sue at Law with that of the plaintiff a bill of exto be brought before the Court does not apply to a bill filed by the change not last indorsee of a bill of exchange which has been lost, against necessary to the acceptor; in which case it has been held that neither the draw- amount of lost er (b) nor the prior indorsees are necessary parties (c), because, bill. in such cases, the ground of the application to a Court of Equity is the loss of the instrument: and the Court only relieves upon the terms of the plaintiff giving the defendant ample security against being called upon again by the drawer or indorsees, in case they should become possessed of the instrument (1). It has been held, however, that where a suit is instituted by an acceptor against the holder of a bill of exchange which is forthcoming, for the purpose of having it delivered up, there the drawer is a necessary party (d).

The principle that persons having co-existent rights with the plaintiff to sue the defendant must be brought before the Court in all cases where the subject-matter of the right is to be litigated in right in equity Equity, is not confined to cases where such co-existent rights to or at law. sue are at Law; it applies equally to cases where another person has a right to sue, for the same matter in Equity; in such cases

⁽z) Sainstry v. Grammer, 2 Eq. Ca. (c) Macartney v. Graham, 2 Sim.

Ab. 165; c. 6.
(a) 2 Vern. 421.
(b) Davies v. Dodd, 4 Price, 176.

⁽d) Penfold v. Nunn, 5 Sim. 405.

⁽¹⁾ Respecting the jurisdiction in cases of lost notes and bills, see 1 Story Eq. Jur. § 85, § 86.

All persons having a right to sue.

Bishop, in suit against sequestrator.

Lunatic, in suit by bishop and sequestrator for tithes.

—— in all suits on his behalf-

Whether for whole or part.

Joint-tenants.

the defendant is equally entitled to insist that the person possessing such right should be brought before the Court before any decree is pronounced, in order that such right may be bound by the de-Thus, where a bill was filed by a vicar against a sequestrator for an account of the profits of a benefice, received during its vacation, it appears to have been thought by the Court that the bishop ought to have been a party to the suit, because the sequestrator was accountable to him for what he had received (e); and, on the other hand, where a bill was filed by a bishop and a sequestrator against an occupier for an account of tithes during the lunacy of the incumbent, who had been found a lunatic under a commission, it was held that the incumbent or his committee ought to have been a party (f). It seems, however, that where a living is under sequestration for debt, the incumbent may maintain a suit for tithes without making the sequestrator or the bishop a party. This appears to have been the opinion of Lord Lyndhurst, C. B., in Warrington v. Sadler (g), where a decree was made in a suit by a vicar for tithes, although the vicarage was under sequestration, and the occupiers had actually paid certain alleged moduses to the sequestrator. Upon the principle above stated, it is held, that in general, where a suit is instituted on behalf of a lunatic either by the Attorney-general or his committee, the lunatic himself must be a co-plaintiff, because he may recover his senses, and would not be bound by the decree (h).

In the preceding cases the party required had a concurrent right with the plaintiff in the whole subject of the suit; the same rule, however applies where he has only a concurrent right in a portion of it; thus, where there are two joint-tenants for life, and one of them exhibits a bill, the other must be a party, unless the bill shows that he is dead (i); and where A., B. and C. were joint lessees under the City of London, and A. and B. brought a bill against the lessors to have certain allowances out of the rent, and it appeared upon the hearing that C. was living, an objection, because he was not a party to the bill, was allowed (k); and so, where a bill is brought for a partition either by joint-tenants or tenants in common, as mutual conveyances are decreed, all persons necessary to make such conveyances must be parties to the suit (I) (1); and

- (e) Jones v. Barrett, Bunb. 192.
   (f) Bishop of London v. Nicholls, Bunb. 141.
  - (g) 1 Young, 283. (h) See ante, page 105.
- (i) Haycock v. Haycock, 2 Ch. Ca. 124; Weston v. Keighley, Rep. temp. Finch, 82.
- (k) Stafford v. The City of London, 1 P. Wms. 428; 1 Stra. 95, S. C. (l) Anon. 3 Swan. 139.

Brashear v. Macey, 3 J. J. Marsh. 93. See Braker v. Devareaux, 8 Paige, 513.

where one tenant in common had granted a lease of his share for having a right a long term of years, the lessee was held to be a necessary party to the suit, at the expense, nevertheless, of his lessor, who was to be responsible for his costs (m).

Where, however, a tenant in common had demised his share for case of partia long term of years, it was held that the termor for years was en- Lessee of tentitled to file a bill for a partition against the other tenants in com- ant in common, without bringing the reversioner of the share demised before mon.

May sue for the Court (n); and so it seems that where one of the parties is partition withonly tenant for life, he may maintain a suit for a partition without out lessor, the party entitled in remainder (o) (1). Where the object of a tenant for life suit is to ascertain boundaries, the rule is different, and the without re-Court will not entertain a bill of that description without having Secus, where the remainder-men and all parties interested before it (p) (2).

It is not, however, in general necessary, in questions relating to ries. real property, that the occupying tenants under leases should be Lessees not parties, unless their concurrence is necessary, as in the case above essary. referred to of the lessee of a tenant in common; or unless the ob-unless in parject of the suit is to restrain an ejectment brought against them or in bills to instead of against their landlord; as in the case of Lawley v. Wal-restrain an don (q), in which Lord Eldon allowed a demurrer for want of par- ejectment. ties to a bill by the owner of an estate, to restrain an injunction against his tenant without making him a party; observing, however, that if the plaintiff in Equity had been made a defendant at Law, instead of his tenant, as he might have been, he should not have thought it necessary to make him a defendant (3).

But, although it is not usual, in suits relating to property, to Owner of inheritance in make the occupying lessees of such property parties to the proceed-suits by les-

(p) Rayley v. Best, 1 R. & M. 659, lish general vide etam, Miller v. Warmington, 1 rights, (n) Baring v. Nash, 1 Ves. & B. 555. Jac. & W. 484; Speer v. Crawter, 2 Mer. 410.

(e) Wills v. Slade, 6 Ves. 498.

(m) Cornish v. Gest, 2 Cox, 27.

(q) 3 Swan. 142.

to sue. tenants in common, in mainder-man. suit to ascer-

sees, to estab-

⁽¹⁾ It does not constitute any objection in Equity, that the partition may not finally conclude the interests of all persons, as where the partition is asked only by or against a tenant for life, or where there are contingent interests to vest in persons not in esse. For the Court will still proceed to make partition between the parties before the Court who possess competent interests such as a tenant for life or for years. The partition in present interests, such as a tenant for life or for years. The partition in such cases, however, is binding only upon those parties who are before the Court, and those whom they virtually represent. 1 Story Eq. Jur. 656; Gaskell v. Gaskell, 6 Simons, 643; Wotten v. Copeland, 7 John. Ch. 140; Striker v. Mott, 2 Paige, 387, 389; Woodworth v. Campbell, 5 Paige, 518.

(2) Story Eq. Pl. § 165.

(3) See Story Eq. Pl. § . 151.

All persons having a right to sue.

to sue.

When a modus in question,

Or fees of office,

Or a right of way.

Lessee of tithes may file a bill without

lessor.

ings, yet if such lessees, or other persons having only limited interests in the property, seek to establish any right respecting such property, it is necessary that they should bring the owners of the inheritance before the Court, in order that in case the suit is unsuccessful, the decree of the Court dismissing the bill may be binding upon them. Thus, to a bill by the lessees of property in a parish to establish a modus, the owner of the inheritance must be a party; and for the same reason, if there is a question concerning a right of common, though a leaseholder may enforce it at law, yet if he bring a bill in Equity to establish such right, he must bring the persons in whom the fee of his estate is vested before the Court (r) (1); and so, in a suit in Equity to establish a right to fees in an office, although in an action at Law for such fees it is not necessary to make any person a party but the one who has actually received such fees, yet in Equity it is necessary to have all persons before the Court who have any pretence to a right (s).

Upon the same principle, where a bill filed by a lessee against a lord of a manor, and the tenant of a particular house, to have the house, which obstructed the plaintiff's way, pulled down, and to be quieted in the possession of the way for the future, the defendant's counsel objected for want of parties, because the plaintiff's lessor was not before the Court, and the objection was allowed (t).

These cases all proceed upon the principle before laid down, namely, that of preventing a defendant from being harassed by a multiplicity of suits for the same thing; in consequence of which principle it is held to be a rule of a Court of Equity, that if you withdraw a question from a Court of Law for the purpose of insisting upon a general right, you must have all the parties before the Court who are necessary to make the determination complete, and to quiet the question (u).

The application of this rule, however, is strictly confined to cases where the lessee seeks to establish a general right; where he only seeks that which is incidental to his situation as tenant, he need not make his landlord a party. Thus a lessee of tithes may file a bill for tithes against an occupier, without making his lessor a party, because the claim to tithes abstracted, is merely

(r) Poore v. Clark, 2 Atk. 515. (s) Pawlet v. Bishop of Lincoln, 2 Atk. 296. (t) Poore v. Clark, 2 Atk. 515. (u) Ibid.

⁽¹⁾ Story Eq. Pl. § 121.

possessory; and, upon the same principle, where an occupier who All persons was sued for tithes by the lessee of an impropriate rector filed a having a right cross bill against such rector for a discovery of documents, &c., a demurrer to such bill by the rector was allowed (x).

It should be noticed here, that in order to entitle a lessee to sue Secus, where for tithes without his lessor, he must claim under a demise by deed, claim under because tithes, being things which lie in grant, cannot be demis- parol demise. ed by parol, and a decree in favor of a plaintiff claiming under a verbal demise, would therefore be no bar to another suit for the same tithes by the lessor. Upon this ground, in Henning v. Willis (y). the Court of Exchequer allowed a demurrer to the plaintiff's bill because the impropriator, who was the lessor, was not a party, and the plaintiff having submitted to the demurrer, obtained leave to amend his bill by making the impropriator a party (z). A similar demurrer was put into a bill for tithes by a lessee under a parol demise, in Jackson v. Benson (a), and allowed; leave being also given to amend, by making the impropriator a party; and in Williams v. Jones (b), the principle to be deduced from the foregoing cases was recognized by Lord Lyndhurst, C. B. In that case the vicar, who was the lessor, had been originally made a party to the suit, but as he had by his answer disclaimed all interest in the tithes in question, the plaintiff had dismissed the bill as against him, and brought the suit to a hearing against the occupier only; and Lord Lyndhurst held, that as the vicar had been originally a party, the circumstance of the bill having been dismissed as against him, made no difference, for although his disclaimer could not be read against the other defendants, no inconvenience could arise, because the lessor, after such disclaimer, would never be allowed to set up any claim against the occupier for the same tithes.

The rule that persons claiming joint interests in an estate can- Joint-tenants not sue without making their companions parties, applies equally of legacy. whether the subject-matter of the suit be real or personal property; thus, where a legacy is given to two jointly, one cannot sue for it alone; though where there are several legacies, each may sue for his own (c) (1). And so, where there are several persons inter-

⁽x) Tooth v. The Dean & Chapter, of Canterbury, 3 Sim. 61.

(y) 3 Wood. 29; 3 Gwil. 898.

(z) The bill was amended, by making the lessor a defendant, and praying that the occupier might be decreed to account with the lessor, and that what should be found due in the ac-

⁽¹⁾ So where a legacy is given to A and B in equal moieties, a bill will lie

All persons having a right to sue.

Of mortgage money.

Tenants in of.

ested, as joint-tenants, in money secured by mortgage, they must all be made parties to a bill to foreclose such mortgage (2). was decided to be the law of the Court by Lord Thurlow, in the case of Lowe v. Morgan (d), where a mortgagee had assigned the money secured by the mortgage to three persons as joint-tenants. In that case, his Lordship appears to have laid a stress upon the common there- circumstance of the parties interested in the money being jointtenants; from which it has been inferred that a tenant in severalty or in common might foreclose as to his share, without making the other persons interested in the money parties; and a decree to this effect was actually made in a case where a trustee of money belonging to several individuals had laid it out on a mortgage, and afterwards one of the persons entitled to part of the purchase money filed a bill against the mortgagor and the trustee for his share of the mortgage money or a foreclosure; which was entertained, although the parties interested in the rest of the money were not before the Court (e).

> In a late case, however, before Sir John Leach, V. C., it was determined, that there can be no redemption or foreclosure unless all the parties interested in the mortgage money are before the Court; and, on this ground, a bill by a person entitled in severalty to one-sixth of the mortgage money, to foreclose one-sixth of the estate, was dismissed with costs.

> As a person entitled to a part only of the mortgage money cannot foreclose the mortgage without bringing the other parties interested in the mortgage money before the Court, so neither can a mortgagee redeem the mortgaged estate without making all those who have an equal right to redeem with himself parties to the suit.

> For this reason it was held, in Lord Cholmondeley v. Lord Clinton (f), that where two estates are mortgaged to the same person for securing the same sum of money, and afterwards the equity of redemption of one estate becomes vested in a different party from the other, the owner of one cannot redeem his part separately.

Entitled to redeem.

All persons interested in

mortgage

money.

Owner of two estates mortgaged for same sum.

(d) 1 Bro. C. C. 368.

(e) Montgomerie v. The Marquis of Bath, 3 Ves. 560. [In Mr. Belt's note (1), to Lowe v. Morgan, 1 Bro. C. C. (Perkins's ed.) 368, he submits,

that the decision in Montgomerie v. M. of B., ubi supra, is evidently wrong. See also Story Eq. Pl. § 201.]
(f) 2 Jac. & W. 3, 134.

by A for his moiety, without making B a party to the suit. Hughson v. Cookson, 3 Young & Coll. 578.

(1) Stucker v. Stucker, 3 J. J. Marsh. 301; Wing v. Davis, 7 Greenl. 31; Palmer v. Earl of Carlisle, 1 Sim. & Stu. 423; Story Eq Pl. § 201; Noyes v. Sawyer, 3 Vermont, 160.

The mortgagee is entitled to insist that the whole of the mortgag. In saits to reed estate shall be redeemed together; and, for this purpose, that all the persons interested in the several estates or mortgages should be made parties to a bill seeking an account and redemption (1).

The same rule prevailed in Palk v. Lord Clinton (g), which differed from that of Lord Cholmondeley v. Lord Clinton, above Owner of part cited, in the circumstance, only, of its being a bill by a second gaged for same mortgagee of part of an estate to redeem a first mortgage, which sum must embraced the whole property.

bring owner of remainder be-

In the above cases, the mortgage of the two estates was for the fore the Court. same sum of money, and was part of the same transaction. rule, however, has been extended to cases where a mortgage has Where two esbeen of two distinct estates to the same mortgagee for securing tates mortgage to secure difdifferent sums of money; and it has been decided in many cases, ferent sums. that a mortgagee of two separate estates, upon distinct transactions from the same mortgagor, is entitled to hold both mortgages till the amount due upon both be discharged; and that even against the purchaser of the equity of redemption of one of the mortgaged estates without notice; so that the mortgages, although for distinct sums, are in effect for one sum. Upon this principle, where the purchaser of the equity of redemption of a mortgaged estate filed his bill against the mortgagee, to redeem, and the defendant, by his answer, stated a subsequent mortgage made to him, by the same mortgagor, of a distinct estate for a distinct debt, it was held that the persons interested in the equity of redemption of the second mortgage were necessary parties to the suit (h) (2). And this rule prevails although one mortgage be a pledge of person. Where one alty and the other a mortgage of realty (i). It does not, however, personal, and hold longer than while both mortgages continue united in the the other of some mortgagee; so that if a mortgagee, having two distinct real estate. mortgages on two separate estates, assigns one of the mortgages to a third person, the assignee of the assigned mortgages need not be brought before the Court in a suit to redeem the other (k).

The rule which requires that in a bill filed for the purpose of redeeming a mortgage, the plaintiff should bring before the Court In suits by

second mortgagee.

(g) 12 Ves. 48.
(h) Ireson v. Denn, 2 Cox, 425.

 ⁽i) Jones v. Smith, 6 Ves. 229, n.
 (k) Willie v. Lugg, 2 Eden, 78.

Story Eq. Pl. § 182.
 See Story Eq. Pl. § 287.

In suits to foreclose.

all those who, as well as himself, have a right to redeem, has been held to apply to a second incumbrancer filing a bill to redeem a prior incumbrance, who must, in such case, bring the mortgagor, as well as the prior incumbrancer before the Court (1). This is a rule of long standing, and was followed by Lord Thurlow, when his adherence to it was very inconvenient in consequence of the heir at law of the mortgagor being abroad. His Lordship then said, that it seemed to him "impossible that a second mortgagee should come into Court against the first mortgagee without making the mortgagor or his heir a party. The natural decree is, that the second mortgagee shall redeem the first mortgagee, and that the mortgagor shall redeem him or be foreclosed (m)." same rule was confirmed by Lord Eldon, in Palk v. Lord Clinton (n), and has ever since been acted upon as the rule of the Court (1).

Prior incumbrancer not necessary.

But although a second mortgagee seeking to redeem a first mortgagee, must make the mortgagor or his heir a party, yet he may, if he please, foreclose the mortgagor and a third mortgagee, without bringing the first mortgagee before the Court, because by so doing he merely puts himself in the place of the mortgagor and subsequent mortgagee, and leaves the first mortgagee in the situation in which he stood before (o) (2). For the same reason it has been held that a third mortgagee buying in the first, need not make the second mortgagee a party to a bill to foreclose the mort-Upon the same ground it is also considered unnecessary, in a bill by incumbrancers for the sale of an estate, to make annuitants, or other prior incumbrancers, parties (p); and so in a suit for the execution of a trust by those claiming the ultimate benefit of the trust after the satisfaction of prior charges, it is held not to be necessary to bring before the Court the persons claiming the benefit of such prior charges; and therefore, to a bill for the application of a surplus after payment of debts or legacies, or other prior incumbrances, the creditors, legatees or incumbrancers need not be parties (q).

Upon the same principle, where, on a bill filed by a creditor against the representative and heir of a trader, for the purpose of

⁽¹⁾ Thompson v. Baskerville, 3 Ch.
Rep. 215.
(2m) Fell v. Brown, 2 Bro. C. C.
(2n) 12 Ves. 48.
(b) Richards v. Cooper, 5 B. 304;
Lord Hollis's case, cited 3 Ch. Rep.
(c) Rose v. Page, 2 Sim. 471.
(q) Lord Red. 172.

Story Eq. Pl. § 84, § 186, § 195. See Hallock v. Smith, 4 John. Ch. 649; 4 Kent, (5th ed.) 185.
 Story Eq. Pl. § 193.

having certain freehold and copyhold estates, which had been de- In matters of vised to him, sold, the annuitants and legatees under the will of the father were made parties, but the Master of the Rolls held, Sale of estates. that as their incumbrances were prior to the interest of the son, surplus. they ought not to have been parties (r).

The same principle which calls for the presence of all persons Administering having an interest in the equity of redemption in the case of bills estate of a trader. to redeem a mortgage, requires that where a mortgagee seeks to foreclose the mortgagor, he should bring before the Court all persons claiming an interest in the mortgage under himself (1); All persons intherefore, if there are several derivative mortgagees, they must all terested in be parties to a bill of foreclosure (s).

If, however, a mortgagee has assigned or conveyed away from Original morthimself not only the money due on the mortgage, but also the gagee not necmortgaged premises, the assignee may, as we have seen, foreclose mortgage aswithout making the original mortgagee a party; and upon the signed; same principle, it may also be inferred, from the case of Renvoize nor heir, v. Cooper (t), that where a mortgagee has devised his interest in where mortthe mortgage in such a manner as to pass not only the mortgage gage devised. money but the estate mortgaged, the devisee alone may foreclose without making the heir at law of the original mortgagee a party (2), unless he claims to have the will established (u); in which case he must be made a defendant, because it has been held that a devisee and heir cannot join in the same suit, even upon an allegation that they have agreed to divide the matter in question between them (x).

ties.

The rule which requires that all parties interested in the object Matters of acof a suit should be parties to the bill, applies to all cases in which count. an account is sought against a defendant. One person cannot exhibit a bill against an accounting party without bringing before the Court all persons who are interested in having the account taken, or in the result of it, otherwise the defendant might be harrassed by as many suits as there are parties interested in the account. Thus in a suit for a share of a partnership adventure, it is in general necessary that all persons having shares in the same

⁽r) Parker v. Fuller, 1 Russ. & M. 656.

⁽t) Mad. & Geld. 371. (u) Lewis v. Nangle, 2 Ves. 631.
(z) Cholmondeley v. Clinton, 1 T.

⁽s) Hobart v. Abbot, 2 P. Wms. 643.

[&]amp; R. 104, 116.

⁽¹⁾ See Story Eq. Pl. § 199; 4 Kent, (5th ed.) 184, 185; Western Reserve Bank v. Potter, 1 Clarke, 432. (2) Graham v. Carter, 2 Hen. & Munf. 6.

account.

Partnership.

Residues.

Contingent in-

In suits by next of kin.

Practice where a class.

In matters of adventure should be parties (y) (1), and a residuary legatee seeking an account and share of the residue, must bring before the Court all the parties interested in that residue (z) (2). And so where a moiety of a residue was given to one of the defendants for life, and, upon his decease, to such persons as she should appoint, and in default of appointment, to certain other persons for life, it was held that the other persons, although their interests depended upon such a remote contingency, ought to be before the Court (a).

Upon the same principle it is, that in suits by next of kin against a personal representative for an account, the Court requires that all the next of kin should be before it (3); and it is to be observed, that in all (b) cases where the parties claim under a general description, or of being some of a class of persons entitled, suit by some of the Court will not make a decree without being first satisfied that all the individuals of the class, or who come under the general description, are before it. For this purpose the Court, in cases of this description, before directing an account, or other relief prayed

(y) Ireton v. Lewis, Rep. t. Finch,96; Moffat v. Farquharson, 2 Bro. C.C. 338.

(z) Parsons v. Neville, 3 Bro. C. C. 365. In Cockburn v. Thompson, 16 Ves. 328, Lord Eldon said, this admits of exception, where it is not necessary, or inconvenient.

(a) Skerrit v. Birch, 3 Bro. C. C. 229, [Perkins's ad and and and art.] [Perkins's ed. note.] (b) Where one of the next of kin of

an intestate, who died in India, procured letters of administration to his effects here, it was held that he might sue the person who had taken out an Indian administration, and had afterwards come to this country, without making the rest of the next of kin parties; Sandilands v. Innes, 3 Sim. 264. [But see Story Eq. Pl. § 179; Story Conf. Laws, § 513, § 514; ante, 209, note (2).]

(1) See Mr. Belt's note (1), to Moffatt v. Farquharson, 2 Bro. C. C. (Perkins's ed.) 338; Cullen v. Duke of Queensberry, 1 ib. 101, and Mr. Belt's note; Dozier v. Edwards, 3 Litt. 72; Story Eq. Pl. § 166; Story, Partner-

ship, § 449.

(2) Story Eq. Pl. § 89, and notes, § 203, § 204; Pritchard v. Hicks, 1
Paige, 253; Sheppard v. Starke, 3 Munf. 29; Brown v. Ricketts, 3 John.
Ch. 533; Davoue v. Fanning, 4 John. Ch. 199; West v. Randall, 2 Mason,
181, 190-199; Richardson v. Hunt, 2 Munf. 148; Prewett v. Prewett, 4
Bibb. 266; Huson v. M'Kenzie, Dev. Eq. 463; Arendell v. Blackwell, ib.
364; Bethel v. Wilson, 1 Dev. & Bat. Eq. 610.

In Brown a Ricketts 2 John Ch. 553 Mr. Chancellor Kent seems to

In Brown v. Ricketts, 3 John. Ch. 553, Mr. Chancellor Kent seems to have thought, that all the residuary legatees should be technically parties by name. So in Davoue v. Fanning, 4 John. Ch. 199.

It has, however, been intimated and maintained in other cases, that a re-

siduary legatee might sue in behalf of himself and all others, without making them technically parties. See Kettle v. Crary, 1 Paige, 417, 419, 420, and note; Ross v. Crary, 1 Paige, 416; Hallett v. Hallett, 2 Paige, 19, 20; Egbert v. Woods, 3 Paige, 517.

(3) See Noland v. Turner, 5 J. J. Marsh. 179; West v. Randall, 2 Mason, 181; Kellar v. Beelor, 5 Monroe, 573; Oldham v. Collins, 4 J. J. Marsh. 50; Chinn v. Caldwell, 4 Bibb, 543; Story Eq. Pl. § 89, and cases cited.

by the bill, refers it to one of the Masters to inquire who the indi- In matters of viduals of the class, or answering the general description, are; and then, if it turns out that any of them are not before the Court, the plaintiff must file a supplemental bill, for the purpose of bringing them in, before the cause is finally heard (c) (1).

account.

And according to Sir James Wigram, V. C., in an administration suit, in which inquiries are necessary to ascertain who are the parties beneficially interested in the estate, it is irregular to direct the accounts to be taken until after the inquiries have been made, and the Master has made his report. But where the parties interested are the children of a party to the suit, or are persons of a class in such circumstances, that the Court may be reasonably satisfied, at the hearing, that all parties beneficially interested are parties to the record, the Court may, at the time of directing the inquiries, also order that, if the Master shall find that all the persons beneficially interested are parties to the suit, he do then proceed to take the account; this is, however, an irregularity; and the Court will not make the order in that form, unless it be reasonably clear that all the persons interested are parties (d).

The rule that all persons interested in an account should be Exceptions to made parties to a suit against the accounting party, will not apply some of the where it appears that some of the parties interested in such ac-parties have count have been accounted with and paid; thus in the case of a ed with and bill by an infant cestui que trust coming of age, for his share of paid. a fund, it is the constant practice to decree an account without requiring the other cestui que trusts, who have come of age before, and have received their shares, to be before the Court (2).

⁽c) Sed vide Waite v. Templer, 1 see also Hawkins v. Hawkins, 1 Hare, 8. & S. 319. 543.

⁽d) Baker v. Harwood, 1 Hare, 327;

⁽¹⁾ Story Eq. Pl. § 90, and notes. But one of several of the next of kin of an intestate, entitled to distribuparties, if the latter are unknown, or cannot be found, and that fact is charged in the bill. Ib. In such case the bill may properly be filed on behalf of the plaintiff, and also of all the other persons, who may be entitled as distributees. Ib.

⁽²⁾ So where the division of an estate in pursuance of a will, is not to be made at one and the same time, but at the several periods when any one or more of the legatees shall separate from the testator's family, it is not necessary that all the legatees be made parties to each suit in Chancery for a division; but only those entitled to participate in the division then in question. Branch v. Booker, 3 Munf. 43.

So where it appeared, that some of the legatees had obtained decrees, in another suit, for their portions, it was proper to dismiss the bill as to them, they having been made defendants. Moore v. Beauchamp, 5 Dana, 71.

Rule in cases And in the case of a partnership, where a bill was filed against of partnerships.

factors by the persons interested in one moiety of a cargo of tobacco, for a discovery and account as to that moiety, without making the person interested in the other moiety a party, and it appeared that the defendants had distinguished in their accounts between him and the plaintiffs, and had divided the funds, and kept separate accounts, the Court held that the owner of the other moiety was not a necessary party to the suit (e). And where A. B. C., being partners together, and A. agreed with D. to give him a moiety of his share in the concern, it was held that an account might be decreed between A. and D. without making B and C. parties (f). It is also held, that to a bill by a person entitled to a certain aliquot portion of an ascertained sum in the hands of trustees, the co-cestui que trusts are not necessary parties (g) (1); In some cases, where a party having a joint interest with the plaintiffs in the taking of an account has been abroad, the cause will be allowed to go on without him (2); thus in the Exchequer, where a bill was filed by some of the children of a freeman of London, who was dead, for an account and division of his personal estate, and it appeared that one of the children was beyond sea, the Court was moved that they might hear the cause without him; and that if it appeared that he had any right, he might come before the deputy remembrancer on the account; and, though no precedent was produced of such an order, the Court gave liberty to hear the case without him (h).

where bill is for portion of ascertained sum.

where party having joint interest out of jurisdiction.

Purchaser of different portions of an estate.

The question whether a trustee of an estate can be called upon by a purchaser of a portion of an estate sold to different persons under a trust for sale, without bringing all the other persons interested in the same estate before the Court, was discussed before Lord Eldon, in the case of Goodson v. Ellison (i); in that case the persons beneficially interested in an estate vested in trustees had, many years before the commencement of the suit, proceeded to sell the entirety in various lots, one of which was purchased by

(e) Weymouth v. Boyer, 1 Ves. J. 416.

(i) 3 Russ. 583.

⁽f) Brown v. De Tastet, Jac. 284. Vide etiam, Bray v. Fromont, 6 Mad. & Geld. 5.

 ⁽g) Perry v. Knott, 5 Beav. 293;
 Smith v. Snow, 3 Mad. 10.
 (h) Rogers v. Linton, Bunb. 200.

⁽¹⁾ Story Eq. Pl. § 207, § 212.
(2) Story Eq. Pl. § 78-89, and cases cited; Milligan v. Milledge, 3 Cranch, 220; West v. Randall, 2 Mason, 196; ante, 233, note and cases cited; Weymouth v. Boyer, 1 Sumner's Vesey, 416, note (c), and cases cited. cited.

the plaintiffs, and all the persons beneficially interested joined in conveying it to him. The trustee, however, did not join, and upon his death the legal estate became vested in the defendants, upon whose refusal to convey without the sanction of the Court, the bill was filed, and a decree for a conveyance by the defendants was pronounced by Lord Gifford, M. R., who directed that they should pay the costs of the suit. Upon appeal, however, to Lord Eldon, his Lordship expressed considerable doubts whether a trustee could be called upon to divest himself of a trust by conveying different parcels of the trust property at different times, and whether it was not therefore necessary to have all the other cestui que trusts before the Court; but upon re-argument the Lord Chancellor stated, that he thought there were parties enough before the Court to enable him to make a decree, but as it was the case of an old trust, he thought the Court was bound to inquire into the facts, and that the trustees had a right to have the conveyance settled in the Master's office.

It is a general rule, arising out of the preceding principles, ad- Cestui que mitting of very few exceptions, that a trustee cannot, under ordi-trusts in suits nary circumstances, institute proceedings in Equity relating to the trust property, without making the cestui que trusts parties to the proceeding (k) (1). Thus, where a bill is filed by trustees for In bills for sale, against a purchaser, for a specific performance of the con-specific performance untract, the cestui que trusts of the purchase-money must be parties der trusts for unless there is a clause in the trust deed declaring the receipt of sale. the trustees to be a sufficient discharge, which is considered as a Secus, where receipts of declaration by the author of the trust, that the receipt of the per- trustees are sons beneficially interested in the produce of the sale shall not be discharges. necessary (1): and where a bill was filed by certain persons, de- Members of a numerous soscribing themselves as trustees for a society consisting of a great ciety. number of persons, for the specific performance of an agreement entered into by themselves for the benefit of the society, and a demurrer was put in because the members of the society were not parties to the suit, upon the argument of which, it was insisted that a trustee could not file a bill respecting the trust property,

(k) Kirk v. Clark, Prec. Cha. 275.(l) Per Sir J. Leach, V. C., Calverly v. Phelp, Mad. & Geld. 232.

Castui que trusts.

⁽¹⁾ A mere nominal trustee cannot bring a suit in his own name, without joining his cestui que trust with him. Stilwell v. M'Neely, 1 Green Ch. 305; Schenck v. Ellingwood, 3 Edw. 175; Helm v. Hardin, 2 B. Monroc, 232; Malin v. Malin, 2 John. Ch. 238; Fish v. Howland, 1 Paige, 20; Bifield v. Taylor, 1 Beatty, 93; Story Eq. Pl. § 207, § 209.

Cestui que trusts.

Where bill on behalf of themselves and others.

Executor of mortgagee.

Heir of mortgagee.

In what cases trustees may sue without cestui que trusts.

without making the cestui que trust a party; and that, although the members of the society were so numerous that it was not practicable to make all of them parties, the bill ought to have been filed by some of them on behalf of themselves and the others, and that it did not appear by the bill that the plaintiffs were even members of the society, the demurrer was upon these grounds allowed (m). Upon the same principle, if a mortgagee dies, and his heir files a bill of foreclosure, the executor of the mortgagee must be a party (1), because, although at law the legal right to the estate is in the heir, yet in Equity he is only considered as a trustee for the executor, who is the person entitled to the mortgage money (n), and for this reason, where the heir of the mortgagee had foreclosed the mortgagor without making the executor of the mortgagee a party, and a bill was filed by the executor against the heir, the land was decreed to the executor (o). It seems, however, that although the personal representative is the person entitled to receive the money, the heir has a right to say that he will pay off the mortgage to the executor, and take the benefit of the foreclosure himself (p); and for this reason as well as that before stated, the heir of a mortgagee is a necessary party to a bill of foreclosure by the personal representative (2) unless the mortgagee has devised the mortgaged estate, in which case, as we have seen, his heir is not a necessary party to a bill by the devisee to foreclose the equity of redemption (a).

There are instances in which, under peculiar circumstances, trustees are allowed to maintain a suit, without their cestui que trusts, as in the case before mentioned, of trustees under a deed, by which estates are vested in them upon trusts to sell and to apply the produce amongst creditors or others, with a clause, declaring the receipt of the trustees to be a good discharge to the purchasers (r) (3). And now by the 30th Order of August, 1841,

(m) Douglas v. Horsfall, 2 S. & S. 184.

(a) Freake v. Hearsey, Nels. 93; 2
Freem. 180, S. C.; 1 Ch. Ca. 51, S.
C.; 2 Eq. Ca. Ab. 77, S. C.; [Dexter v. Arnold, 1 Summer, 113]

(o) Gobe v. Carlisle, cited 2 Vern. 66.

(p) Clerkson v. Bowyer, 2 Vem. 66.

(q) Renvoize v. Cooper, Mad. &. Geld. 371.

(r) See Calverly v. Phelp, Mad. & Geld. 229; as to foreclosure is such cases, vide post, S. C.

(1) See Roath v. Smith, 5 Conn. 133; Graham v. Carter, 2 Hen. & Munf.

6; Story Eq. Pl. § 200.

(2) Story Eq. Pl. § 200. The heirs of a deceased mortgagee cannot, however, sustain a bill for foreclosure, but it must be brought in the name of the executor or administrator. Roath v. Smith, 5 Conn. 133.

(3 Where it appears on the face of the contract that it was the intent of

in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale, and for the rents and profits of the estate, such trustees shall represent the persons beneficially interrested in the estate, or the proceeds, or the rents and profits, in the same manner, and to the same extent as the executors or administrators in suits concerning personal estate, represent the persons beneficially interested in such personal estate; and in such cases it shall not be necessary to make the persons beneficially interested in such real estate, or rents and profits, parties to the suit. But the Court may upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties; this order applies, not only to suits by persons claiming adversely against the estate, but also to suits by some of the persons beneficially interested, seeking relief in respect of alleged misconduct of the trustees. And in such cases, it renders it unnecessary that persons having charges on the estate should be parties (s). It is necessary, however, that the trustees who are empowered to give discharges, should themselves be entitled to the legal estate, otherwise the order does not apply, and the cestui que trusts must be made parties to the suit (t). In case also where the interest of the cestui que trust is collateral to the rights between the plaintiff and the defendant, a person standing in the place of trustee has been allowed to maintain a suit respecting the trust property, without making the persons for whom he is trustee, parties; thus the Pawnee, or pawnee of a chattel or his representative may maintain a suit for the chattel without making the pawner a party. And so in the deposites of a case of Saville v. Tancred (u), where a bill was brought for an chattel.

Cestui que truste.

⁽t) Turner v. Hind, 12 Simons, 414. It seems doubtful whether the order applies to the case of a bill of foreclo-

⁽s) Osborne v. Foreman, 2 Hare, sure of freeholds devised in trust for 656. sale. Wilton v. Jones, 2 Y. & C. 244.

⁽u) 1 Vesey, 101; 3 Swanst. 141, S. C

the parties to exclude the cestui que trust from the necessity of taking any part in the transaction relating to the management of the trust, the cestui que trust is not a necessary party. Bifield v. Taylor, 1 Beat. 91; S. C. 1 Moll. 192.

Where a mortgage deed of lands has been executed to a trustee, to secure the payment of debts to sundry persons, the trustee may maintain a suit in Chancery to foreclose, without making the cestui que trusts parties. Swift v. Stebbins, 4 Stew. & Port. 467.

A conveyance in trust may be cancelled by a decree in Equity though the cestui que trusts be not made parties. Campbell v. Watson, 8 Ohio, 500.

Cestui que trusts.

Trustee suing

co-trustee, ces

tui que trusts not necessary. account, and for the delivery of a strong box, in which were found jewels, and a note in these words:--" Jewels belonging to the Duke of Devonshire," in the hands of Mr. Saville, whose representative the plaintiff was, and in whose possession they had been for fifty years, and an objection was taken that the Duke's representative ought to have been a party, it was held that the plaintiff might sustain the suit without him (1). And upon the same principle, where one of two trustees had been prevailed upon by his co-trustee to transfer the trust fund into his name alone, and the co-trustee afterwards sold the stock, and received the produce, and never replaced it; upon a bill filed by the trustee against his co-trustee to compel him to replace the stock, a demurrer was put in, on the ground that the cestui que trusts of the fund were not made parties, which upon argument was overruled (v) (2).

Personal representative may sue without persons

terested.

And here it may be observed, that the personal representative in all cases represents the personal estate of the deceased, and is beneficially in- entitled to sue for it in Equity as well as Law, without making the residuary legatees, or any other persons interested in it, parties to the suit. For this reason, where a woman by her will gave all her personal estate to her bastard child, and made B. and C. her executors, and died; and within a short time after the bastard died intestate; upon a bill filed by the executor against a person in whose hands the property of the mother was, praying for an account, the defendant demurred, because the representative of the bastard and the Attorney-general were not parties; and the demurer was overruled, it being held that the executor was legally entitled to the estate of his testatrix; and though this may be in trust for another, yet as the executor has the legal title, he can give a good discharge to the defendant (w). And in every case, an executor, though a bare trustee, and though there be a residuary legatee, is entitled to sue for the personal estate in Equity as well as at Law, unless the cestui que trusts will oppose it (z).

Where executor in trust.

> (w) Jones v. Goodchild, 3 P. Wms. 33. (v) Franco v. Franco, 3 Ves. 77; Bridget v. Hamer, 3 Y. C. 72; May v. Selby, 1 Y. & C. 235. (z) Ibid. 48.

(1) Story Eq. Pl. § 221.
(2) Story Eq. Pl. § 213, and a discussion of this subject in the note; Cunningham v. Pell, 5 Paige, 607.

If a trustee has fraudulently or improperly parted with trust property, the cestui que trust may proceed against the trustee alone, to compel satisfaction for the breach of trust, or he may at his election join the assignee also, if he were a party to the fraud, or if he seeks redress against him. Bailey v. Ingles, 2 Paige, 278; West v. Randall, 2 Mason, 197; Franco v. Franco, 3 Sumner's Vesey, 75, note (4).

however, there has been a great lapse of time since the death of the testator, and it seems doubtful who are the persons beneficially interested under his will, the Court will not, as of course, order payment to a personal representative of funds recovered in the cause, but may direct them to be paid into Court (v).

Cestui que trusts

So also assignees of bankrupts or insolvent debtors may either Assignees of maintain or defend suits relating to the estates vested in them as insolvents. such assignees, without the creditors for whom they are trustees being made parties to the suit (z). Nor is it necessary in such case, that the bankrupt or insolvent, though interested in the residue, should be before the Court (a), though, from a decision in Vernon's Reports, it appears to have been formerly considered necessary in suits by assignees to have the bankrupt before the Where, however, creditors, instead of seeking relief under the Commission, proceed at Law against the bankrupt, the bankrupt may file a bill of discovery in aid of his defence at Law, and for an injunction; and where there are complicated accounts, he may pray to have them taken, and to have the balance due to him from the defendants set off against the demand of the creditors, without making his assignees parties(c), but he cannot pray to have the balance paid to him, because that belongs to his assignees.

The rule, that where the person, by law entitled to represent the Residuary legpersonal estate, is the party suing, legatees or other persons interested in the estate need not be parties, does not extend to the case of a residuary legatee suing for his share of the residue, in which case, as we have seen, it is generally necessary that all the residuary legatees should be before the Court, although where the number of the class is great, the Court will sometimes dispense with the necessity of making them all parties, and allow one to sue on behalf of the others (d) (1). And where legacies are charged Where legaupon real estates, it will not in general be sufficient to bring the cies charged on real estates. executors before the Court, for except in cases coming within the Trustees for 30th Order of August, 1841, above mentioned, all the other lega-payment of tees must be parties (e) (2); it seems, however, that trustees of a debts sue withreal estate for payment of debts, have been allowed before that Or-

out creditors.

^{305;} Ex parte Ram, 3 My. & Cr. 25.
(2) Spragg v. Binkes, 5 Ves. 587.
(a) 3 P. Wms. 311, in notis.

⁽y) Loy v. Duckett, 1 Cr. & Ph. 1 Eq. Ca. Ab. 72; Pl. 7, S. C. 5; Ex parte Ram, 3 My. & Cr. 25. (c) Lowndes v. Taylor, 1 Mad. 423. (d) Harvey v. Harvey, 4 Beav. 215. (e) Morse v. Sadler, 1 Cox, 352.

⁽b) Sharpe v. Gamon, 2 Vern. 32;

See ante, 265, note (2).
 Hallett v. Hallett, 2 Paige, 15; Todd v. Sterrett, 6 J. J. Marsh. 432;

Cestui que trusts.

Appointees under will of feme covert.

der to sue, without bringing before the Court the creditors or legatees for whom they are trustees (f).

But although in ordinary cases the executor represents the whole personal estate, and no legatee need be a party, because the personal estate may be exhausted by the debts, and the interest of the legatee is therefore uncertain, the appointees under the will of a feme covert are in a different situation, their interest cannot be defeated by debts, and they are in the common situation of cestui que trusts, and must be made parties (1); therefore, where the administrator with the will annexed of a married woman, filed a bill, praying that the defendants might pay over to him a sum of money, as to which a testamentary appointment had been executed by the testatrix, by virtue of a power in her marriage settlement, without making the appointees parties, the Court ordered the case to stand over, with leave for the plaintiff to amend by bringing the appointees before the Court (g). Where, however, the appointees were very numerous, and the bill was filed by some of them on behalf of themselves and the others, the Court dispensed with the general rule which required them all to be parties (k) It is to be observed, that in Craker v. Parrott (i), on a bill filed by one of four children, who were appointees of their mother, to set aside the appointment on account of the unfairness of the distribution, it was held that all the other children who were appointees need not be parties, because they might go in before the Master.

Executors must all join;

But although an executor or administrator, as representing the personal estate and all those interested in it, may sue for the recovery of any part of that estate without making the persons beneficially interested parties to the proceeding, yet where there are more than one executor or administrator, one cannot maintain a

(f) Lord Red. 174; see however 168. Harrison v. Stewardson, 2 Hare, 530. (h) Manning v. Thesiger, 1 S. & S. 106. (g) Court v. Jeffery, 1 S. & S. 105; but see Owens v. Dickenson, ante, p. (i) 2 Cha. Ca. 228.

Howland v. Fish, 1 Paige, 20. In this last case the Court remark, "In Morse v. Sadler, 1 Cox, 352, the Master of the Rolls decided, that every legatee, whose legacy was charged on the real estate, must be a party to the bill. It is true that case was overruled by Chancellor Kent, in Brown s. Ricketts, 3 John. Ch. 553, where it was held, that one legatee might file a bill in favor of himself and all others, who might choose to come in under the decree. But even then, Chancellor Kent considers it necessary, that the bill should state the fact that it is filed in behalf of the plaintiff and all others, &c. The reason of the rule seems to be, that the defendants may not be charged with a double defence "
(1) Story Eq. Pl. § 204, and note.
(2) Story Eq. Pl. § 217.

suit alone without the others (k) (1); and where to a bill filed by one executor, a demurrer was put in on the ground that a co-executor, who was an infant, was no party, the bill was ordered to be Where execuamended (1). Where, however, one executor of several has alone or has not proved, he may sue without making the other executors parties, proved. although they have not renounced (m) (2). In this respect, the rule of Courts of Equity is different from that of Courts of Law. as there, if there be several executors or administrators, they must all join in bringing actions though some have not proved the will, or have refused before the ordinary (n). In another respect also All executors the rules adopted by Courts of Equity differ from those of Courts need not be of Law in matters of this description, because at Law, all persons co-plaintiffs. having a joint interest, must join in an action as plaintiffs; but in Equity it is sufficient that all parties interested in the subject of the suit should be before the Court either as plaintiffs or defendants; therefore one of two or more assignees of a bankrupt may sue in Equity without his co-assignees, provided they are made defendants (o), and so one executor may sue without his co-executor joining, But must be if the co-executor be made a defendant (3). It appears, that in a parties. case of this description, Lord Thurlow at first doubted whether the co-executor was entitled to his costs, but that he at length ordered them to be paid (p).

Cestui que

It may be collected from several of the preceding cases, that al- Persons entithough it is necessary to have before the Court all persons claiming tled in remainder or reverconcurrent interests with the plaintiff, yet it is not requisite, in or-sion.

der to make a person a necessary party, that such interest should

(k) Offley v. Jenney, 3 Cha. Rep. 92.

(m) Davies v. Williams, 1 Sim. 5. But where a person devises that his executors should sell his land, and leaves two executors, one whereof dies and the other renounces, and administration is granted to A., who brings a bill against the heir to compel a sale, it seems doubtful whether the renouncing executor, in whom

the power of sale collateral to the executorship was vested, ought not to be made a party. Yates v. Compton, 2 P. W. 308.

(n) Kilby v. Stanton, 2 Younge & Jerv. 77; and vide Williams on Executors and Administrators, 1147, and the cases there cited.

(o) Wilkins v. Fry, 1 Mer. 244. (p) Blount v. Burrow, 3 Bro. C. C.

Cramer v. Morton, 2 Moll. 108.
 Cramer v. Morton, 2 Moll. 108; Thompson v. Graham, 1 Paige, 384.
 See contra, Judson v. Gibbons, 5 Wendell, 224.

(3) See Dane v. Allen, 1 Green, Ch. 288.

But an executor, though he has not proved the will, is a necessary party defendant to a suit to carry the trusts of the will into execution. Fergusson v. Fergusson, 1 Hayes & J. 300.

tled in remainder or reversion.

Persons enti- be immediate, it will equally apply, whether the interest be in possession, remainder or reversion; and upon this principle it is held, that in all cases in which an estate is claimed, against another, by a person deriving title under a settlement, made either by deed or will, it is necessary to make all the persons claiming under such settlement parties to the suit, down to the person entitled to the first vested estate of inheritance, either in fee or in tail, inclusive. on this principle, where a bill was filed for the execution of a trust for settling an estate on several branches of a family, it was held necessary to make the first person entitled to the inheritance, a party (q) (1). And where A. was tenant for years, with remainder to B. for life, with remainder to C. in fee, and B. brought a bill against A. for an injunction to restrain his committing waste, it was held that the remainder-man, or reversioner in fee, ought to be before the Court (r) (2).

Not those after first estate of inheritance.

It is not however necessary, in such cases, to bring before the Court any person entitled in remainder or reversion after the first vested estate of inheritance, because such person is considered sufficient to support all those who are in remainder behind him; and where an exception was taken to a bill, for want of proper parties, because a remainder-man expectant upon an estate tail was not a party; the exception was overruled, because such a remainder-man is not regarded in Equity (s) (3).

Persons entitled to intermediate estates.

It is to be observed, that although in cases of this description, the first person in existence who is entitled to a vested estate of inheritance, is sufficient to represent all remainders behind him, yet it is necessary, that all persons entitled to intermediate estates, prior to the first vested estate of inheritance, should be before the Court: thus, where a marriage settlement was made of lands on the husband for life, remainder to the wife for life, with divers remainders over, and a bill was brought by the husband, in order to have the opinion of the Court whether a certain parcel of land was not intended to be included in the settlement, and the wife was not a party, the case was ordered to stand over, in order that she might be made a party, the Court being of opinion, that if a decree

(q) Finch v. Finch, 2 Ves. 492. (r) By Lord King, in Mollineux v. Powell, cited 3 P. Wms. 268, n. Sed

vide 1 Dick. 197, 198, and Eden on Injunctions, 163. (s) Anon. 2 Eq. Ca. Ab. 166.

Story Eq. Pl. § 144, note.
 Story Eq. Pl. § 159.
 Eagle Fire Ins. Co. v. Cammet, 2 Edw. 127.

should be made against the husband, it would not bind her (t); Persons entiand so, where a bill was brought by a son, who was remainder-man in tail under a settlement, against his father, who was tenant for life under the same settlement, to have the title-deeds brought into Court that they might be forthcoming for the benefit of all parties interested; and objections were taken for want of parties, one of which was, that a daughter of the defendant, who was interested in a trust term for years, prior to the limitation to the plaintiff. was not before the Court, Lord Hardwicke held the objection good(u).

der or reversion.

Another objection in the same case was, because certain annuitants of the son, upon his reversion after the death of his father, were not parties, and Lord Hardwicke held, that he could not make the order prayed until the annuitants were first heard, and that consequently the objection must be allowed (x). From this it would seem, that although a remainder-man in tail may maintain a suit without bringing the persons entitled to subsequent remainders before the Court, yet if he has charged or incumbered his estate in remainder, the persons interested in such charge or incumbrance must be parties; and it is held, that a person claim- Incumbraning under a limitation by way of executory devise, not subject to tate tail must any preceding estate of inheritance by which it may be defeated, be parties. must be a party to a suit in which his rights are involved (y); but So executory executory devises to persons not in esse, may be bound by a decree devisees. against the first estate of inheritance. Where the intermediate estate is contingent, and the person to take is not ascertained, it is sufficient to have before the Court the trustees to support the contingent remainder, together with the first person in esse entitled to the first vested estate of inheritance (z). Lord Hardwicke, in Hopkins v. Hopkins (a), states the practice upon this point thus: - " If there are ever so many contingent limitations of a trust, it is an established rule, that it is sufficient to bring the trustees before the Court, together with him in whom the first remainder of the inheritance is vested; and they that may come after will be bound by the decree, though not in esse, unless there be fraud or collusion between the trustees, and the first person in whom the remainder of the inheritance is vested."

Thus, in Lord Cholmondeley v. Lord Clinton (b), in which the

⁽t) Herring v. Yeo, 1 Atk. 290. (z) Lord Cholmondeley v. Lord (a) Pyncent v. Pyncent, 3 Atk. Clinton, 2 J. & W. 1.

⁽a) 1 Atk. 590. (b) Ubi supra.

⁽z) Ibid. (y) Lord Red. 173.

ing under in-consistent titles.

Persons claim- estate which was the subject of litigation was settled upon Baron Clinton for life, and, after remainders to his children (who were unborn) and their heirs in tail, upon the person who should then be entitled to claim as Baron Clinton in tail, with ultimate remainder to the existing Lord Clinton in fee, it was objected that the person presumptively entitled to the barony, ought to have been a party; but Sir William Grant, M. R., overruled the objection upon the ground above stated.

Persons entitled to intermediate estates coming into esse.

If a person entitled to an interest prior in limitation to any estate of inheritance before the Court, should be born pending the suit, that person must be brought before the Court by supplemental bill (c); and if the first tenant in tail, who is plaintiff in a suit, dies without issue before the termination of the suit, the next remainder-man in tail, although he claims by new limitation, and not through the first plaintiff as his issue, is entitled to continue the suit of the former tenant in tail by supplemental bill, and to have the benefit of the evidence and proceedings in the former suit (d).

In all the preceding cases the rights of the several parties to the subject-matter in litigation were consistent with each other, and were the result of the same state of facts, so that the same evidence which would establish those facts would establish the rights of all the parties to maintain the ligitation; the rules, therefore, of Equity, require that all those parties so deriving their right of litigation from the same facts, should be brought before the Court, in order that such their rights may be simultaneously disposed In cases, however, where the claims of the several parties claiming the subject-matter of the suit do not arise out of the same state of circumstances, but can only be supported upon grounds which are inconsistent with each other; so that if the grounds upon which the plaintiff supports his claim be correct, the case relied upon by the other parties claiming the same thing cannot be supported, then such other parties need not be brought before the Court. And the reason of this is obvious, for if a plaintiff resting his case upon a particular title, which is inconsistent with the title set up by the other claimants, is able to establish the truth of his case by evidence, he will be entitled to a decree against the defendant whom he sues; if he is not in a situation to establish his case, his bill must of course be dismissed, and the circumstance of his having brought other parties claiming under a different title before the Court, would be of no advantage to

⁽c) Lord Red. 173.

the circumstance of his having brought other parties claiming un- Persons claimder a different title before the Court, would be of no advantage to ing under inthe defendant principally sued, because, if the plaintiff fails in his claim, the bill must be dismissed as against them as well as Impropriator, against the principal defendant, and such dismissal can be no bar in a suit by to prevent the other parties, themselves, from asserting their claim vicar for tithes. against the defendant. This principle was acted upon by the late Lord Chief Baron Richards, in the case of Williamson v. Lord Lonsdale (e), which was a suit filed by a vicar against occupiers for tithes, and his Lordship refused to give an impropriator, who had been made a party to the suit, his costs at the hearing, on the ground that he ought to have demurred to the bill. In that case it was clear that the vicar could only recover the tithes sought, under an endowment, the existence of which he must have established by proof before he could have obtained a decree against the occupier. This proof, at the same time that it showed his right to a decree against the occupier, showed also that he had no right to any decree against the impropriator, so that the bill, as against the impropriator, must have been dismissed, and such dismissal would have been no bar to any subsequent proceedings by the impropriator against his co-defendant. rule was afterwards acted upon by the same learned judge in a subsequent case of Patch v. Dalton (f), which was the case of a suit for tithes by a vicar against an occupier, who set up, by way of defence, a right in the rector.

It is proper here to observe, that the authority of these decisions has since been called into question by Sir Thomas Plumer M. R., Vicar, in suits in the case of Dawes v. Benn (g). In that case a bill was filed by impropriator. by an impropriator against an occupier for tithes, who set up, by way of defence, a demand made upon him by the vicar, to whom he had paid the tithes in question. Upon the answer coming in, the vicar was made a party, but died before the cause came on. At the hearing, it was objected that the new vicar and the representatives of the late vicar ought to be parties, in answer to which, the above cases before Lord Chief Baron Richards were cited; but the Master of the Rolls allowed the objection, to the extent of considering the present vicar a necessary party, but observed, that

⁽e) Daniell's Exch. Rep. 171; 9 Pri. 187, S. C. Vide etiam, Williams v. Price, Dan. 13; 4 Pri. 156; and Carte v. Ball, 3 Atk. 500.

⁽f) Scace. Jan. 1819, cited 1 Jac. & W. 515. (g) 1 Jac. & W. 513; see also Bailey v. Worrall, Bunb. 115.

ing under inconsistent ti-

Persons claim- as the sum received by the late vicar was very small, his representatives might be dispensed with. It is to be remarked, however, that in giving his judgment, the learned Judge expressly said, that the opinion of the Lord Chief Baron was entitled to very great weight and consideration, and ought not to be disturbed, and that he did not wish it to be understood that there is any general rule always to make a vicar a defendant, as such a rule would be very inconvenient; for this was a usual mode of recovering tithes, and as the suit involved no question of right, it would be quite unnecessary, and would only be to load the proceedings with additional expense. His Honor, in fact, decided the case upon the special circumstances, of which a very strong one was, that an action at Law had already been brought against the occupier for the purpose of deciding the right, in which the rector had been nonsuitted, so that this was the second suit which the occupier had been subjected to, and it was considered very hard upon him to be thus harassed without having the real question decided in such a manner that he might be made safe in paying one of the parties.

> The inference to be drawn from this case before Sir Thomas Plumer, amounts therefore to nothing more than this, viz. that in general, on a bill filed by an impropriate rector for the recovery of tithes from an occupier, the vicar is an unnecessary party, and so is the impropriator to a bill of the same nature by a vicar, unless the object of the suit is to decide the right as between the vicar and impropriator, in which case it appears to have been the opinion of Sir Thomas Plumer that they must both be brought before the With great deference, however, to so great an authority, it does appear to the writer that they are unnecessary parties, and that for the reason stated by the Lord Chief Baron, namely, that no decree could be made against them; for if a bill be filed by a vicar against an occupier, and an impropriator be made a party. whatever the result of the suit with regard to the occupier may be, the only result, with regard to the impropriator, must be the dismissal of the bill against him; and so with respect to the vicar in a suit by an impropriator, if the plaintiff should fail in his claim, of course the result of the suit must be the dismissal of his bill against the defendant, and if he should succeed as far as the vicar is concerned, the consequence must be the same, so that the dismissal of the suit cannot be considered as deciding the question. It is to be observed, that in the same case of Dawes v. Benn (h), when it came on again for hearing, his Honor's opinion seems to have experienced a considerable alteration. It appears

Vicar in suits by impropriaor.

by the report of what took place upon that occasion, that notwith- Persons claimstanding the judgment pronounced on the former occasion, the ing under inplaintiff did not avail himself of the opportunity given him of bringing the new vicar before the Court, but filed a bill of revivor against the representatives of the former vicar, and in consequence an objection was taken because the existing vicar had not been made a party pursuant to the opinion of the learned Judge, according to which it was necessary that he should be before the Court for the purpose of supporting the right. The Master of the Rolls, however, allowed the cause to go on, observing, "There are two ways of considering the question of the necessity of making the vicar, who has become such since the commencement of the suit, a party to it: first, whether it is necessary in respect of the right, and secondly, in respect of the account. Now in respect of the right, I think it is not necessary, because the bill is for an account only, and not to establish any right; in another suit there may be another decision, but the vicar may be interested in the account, and for that reason may be a necessary party." His Honor then, after observing that he did not recollect any case where the circumstance of a vicar dying before the hearing had occurred, and that fortunately he had not to deal with the difficulty then, as the plaintiff had waived the account, except for the two years of the incumbency of the former vicar, says, "the suit being thus confined, for what purpose should the vicar be made a party? would be perfectly nugatory, for he ought not to be made a party to contest the right, and the object of a suit now is reduced to an account, in which he is not interested."

In a more recent case before Sir A. Hart, V. C., the propriety of requiring the impropriator to be a party to a suit by a vicar for tithes, was fully discussed, and his Honor expressed his opinion to be, upon the authority of the cases of Williams v. Price, and Williamson v. Lord Lonsdale (i), that they ought not to have been parties; and he grounded his opinion upon the very reasons adopted by the Lord Chief Baron, in those two cases, in the first of which he assigned as a reason, that no decree could be made against the impropriator; and in the second, that a bill for an account of tithes was a mere possessory bill (k).

But whether it be or be not improper to make the impropriator Impropriator a party to a bill for tithes by a vicar, yet if he is made a party, im-or vicar not objecting, liaproperly or not, and does not think fit to demur, or by his answer ble to their to insist that he ought not to be made a party, or enter into the own costs.

ing under inconsistent titles.

Persons claim- discussion, but chooses to join in an answer with the occupiers, and to suggest and prompt their defence, the question becomes a very different one; and though no account can be decreed against him, yet it would be difficult to say that he may not be made to pay the costs (1).

Portionist of tithes.

And so if a person not being an impropriator, but merely a portionist of tithes, should join in the defence of a suit on the ground of his title, and the defence should fail, he may be ordered to pay the costs, although there can be no other decree against

With respect to suits for specific performance, it is a general rule, that none but parties to the contract are necessary parties to the suit (n); and where there are other persons so interested in the subject-matter of the contract, as that their concurrence is necessary for the completion of the title, it is the duty of the vendor to bring them forward to assist in giving effect to his contract, but as plaintiffs they have no right to sue. If such persons should be infants, and it were attempted, by making them co-plaintiffs with the vendor, to bind their rights by a decree, the fact of their being so made parties, would be a fatal objection to the suit; and whether the point was or was not raised by the other parties, the Court would refuse to pronounce a decree (o): and as such persons cannot sue as plaintiffs in suits for specific performance by vendors, so in suits by purchasers they cannot be made defendants (p). It would appear, however, in some cases, where subsequently to the contract another person has acquired an interest under the vendor, and with notice of the rights of the purchaser, that in a suit for specific performance by the purchaser, he has been allowed to join such person with the vendor as a defendant to the suit (q).

Heir of devisor not party to suit relating to lands devised.

Formerly it was the invariable practice of Courts of Equity to require the heir at law to be a party to a suit in all cases where the trusts of a will of real estate were sought to be executed. This practice arose from the peculiar principle adopted by Courts of Equity in cases of wills relating to real estate, namely, that they would not carry into effect a will of real estate, until the due exe-

⁽l) Per Lord Ch. B. Alexander, Wing v. Morrell, M'Cleland & Y. 625.

⁽m) Ibid. (n) Roberts v. The Great Western Railway Company, 10 S. 314; Humphrey v. Hollis, Jac. 73; Paterson v. Long, 5 Beav. 186.

⁽o) Wood v. White, 4 M. & C.

⁽p) Tasker v. Small, 3 M. & C. 63.

⁽q) Spence v. Hogg; Collott v. Hover, 1 Coll. 225; but see Cutta v. Thodey, 13 S. 206, and 1 Coll. 225.

cution had been either admitted by the heir or proved against him. Persons claim-For this purpose, it was necessary that the heir should be made an consistent tiadverse party. The case of an heir at law was therefore an exception to the rule above laid down, that persons claiming under titles inconsistent with those of the plaintiff, need not be made parties to the suit. This exception has now been in a great measure abolished, for by the 31st Order of August, 1841, it is provided, "that in suits to execute the trusts of a will, it shall not be necessary to make the heir at law a party; but the plaintiff shall be at liberty to make him a party when he desires to have the will established against him." Before this Order, it was necessary in suits for the administration of real assets under 3 & 4 Will. IV. c. 104, that the heir at law, as well as the devisee, should be a party (o); and where the suit was brought against the devisee, under the Statute of Fraudulent Devises (p), the heir at law was a necessary party (1).

Although, however, the heir at law was a necessary party to Nor where suits instituted for the purpose of making devised estates applideed to pay cable to the payment of debts, he was not a necessary party to debts. suits instituted by creditors claiming under a deed whereby estates had been conveyed to trustees to sell for payment of debts. unless he was entitled to the surplus of the money arising from the sale.

Even before the last-mentioned order, there were some cases in which the Court would direct the execution of the trusts of a will. where the heir at law was not a party; thus, where a trustee had been dead several years, and freehold lands, subject to the trust, had been quietly enjoyed under the demise, a sale was decreed without the heir being a party (q). So, where the heir at law was abroad, or could not be found, or made default at the hearing, the trusts of a will have been executed in his absence, but without a declaration that the will was well proved (r) (2); and even upon some occasions the Court has, upon due proof of the execution of

⁽o) Brown v. Weatherby, 10 Sim. 125.

⁽r) French v. Baron, 1 Dick. 138; 2 Atk. 120, S. C.; Stokes v. Taylor, 1 Dick. 349; Cator v. Butler, 2 Dick. (p) 3 & 4 W. & M. c. 14. (q) Harris v. Ingledew, 3 P. Wms. 92, 94. 438; Braithwaite v. Robinson, ib. n.

⁽¹⁾ Story Eq. Pl. § 163. Where the real estate of the deceased party is by statute made personal assets for the payment of debts, it is unnecessary to make the heir or devisee of the estate a party to a suit for the administration of the assets. Story Eq. Pl. § 163, and note; Ex parte Rulluff, 1 Mass. 240; Grignon v. Astor, 2 Howard, (U. S.)

⁽²⁾ Story Eq. Pl. § 87.

Persons claim- the will and of the sanity of the testator, declared the will well ing under inconsistent titles.

proved in the absence of the heir (s). There has been no decision upon the point under the last-mentioned Order, but it seems reasonable to suppose that the Court will not order a devised estate to be sold, or carry into execution any trusts concerning real estate devised in the absence of the heir at law, without proof of the execution of the will and of the sanity of the testator; although, as there is no provision in the Order to make evidence of the execution of a will, and the sanity of the testator, taken in the absence of the heir at law, admission against him or any one claiming under him, the Court still continues unable, by decree in his absence, to insure the title against his rights (t); the Order, however, provides, that in cases in which the plaintiff desires to have the will established against the heir, he shall be at liberty to make him a party for that purpose, — a liberty which, it is apprehended, the plaintiff must exercise in all cases in which any title is to be established under the devise. As the Order provides for the execution of the trusts of a will in the absence of the heir, and also gives liberty to make him a party, where it is sought to have the will established against him, it seems scarcely probable that under any circumstances, the old practice, of declaring a will well proved in the absence of the heir, will be continued. It was formerly the practice, where the heir at law could not be found, to make the Attorney-general a party to a bill for carrying the trusts of a devise of real estates into execution, on the supposition that the escheat is in the Crown, if the will set up by the bill should Person entitled be subject to impeachment. If any person should claim the escheat against the Crown, that person may be a necessary party (u).

Heir necessary where will sought to be established.

to escheat.

Effect of joinder of plainconsistent titles.

The rule which has been before noticed, that persons claiming tiffs having in. under titles which are inconsistent with that of the plaintiff, should not be made parties to a suit, even though they are in a situation to molest the defendant in the event of the plaintiff being unsuccessful in establishing his claim, is equally applicable to prohibit their being made parties as co-plaintiffs or as defendants. in the case of the Attorney-general v. Tarrington (x), where an information and bill was exhibited in the Exchequer by the King's Attorney-general, and the Queen-dowager and her trustees as plaintiffs, against the lessees of the Queen, of certain lands which had been granted to her by the Crown for her jointure, in respect

⁽s) Banister v. Way, 2 Dick. 599; vide acc. Williams v. Whingates, 2 Bro. C. C. 399.

⁽t) Lord Red. 172.

⁽w) Ibid.

⁽z) Hardres, 219.

of the breach of the covenants in their leases, it was held that the Persons claim-King and Queen-dowager could not join, because their interests were several; and so in the case of Lord Cholmondely v. Lord Clinton (y), where a bill was filed by two persons, one claiming as devisee, and the other as heir at law; and the question was, whether they could maintain a suit to redeem a mortgage, on the allegation "that questions having arisen as to which of them was entitled to the estate, they had agreed to divide the estate between them," Sir Thomas Plumer, M. R., strongly expressed his opinion Devisee and that the Court could not proceed on a bill so framed. In a sub-heir at law. sequent case between the same parties, the title of the plaintiff was stated in the same way as in the first, and Lord Eldon, though he allowed the demurrer which was put in to the bill upon other grounds, expressed a very strong opinion, that two persons claiming the same thing by different titles, but averring that it is in one or the other of them, and each contending that it was in himself, could not join in a suit as co-plaintiffs. His Lordship said, "that the difficulty of maintaining a suit where there are two plaintiffs, A. and B., and each asserting the title to be in him, is this, that if the Court decides that A. is entitled, and the defendants do not complain, how is B. as a co-plaintiff to appeal from that decree?" And in the recent case of Saumerez v. Saumerez (z), where the interests of a father and his children who were joined as co-plaintiffs in the suit were at variance with one another; Lord Cottenham said, that as the record was framed, it would be quite irregular to make any adjudication concerning their conflicting interests, and directed a new bill to be filed.

In a case before the same judge, when Master of the Rolls, Settlor and where a bill had been filed by the settlor in a voluntary settlement, purchaser, in for the purpose of avoiding the settlement, in which another per-settlement unson claiming as a purchaser, under the 27 Eliz. c. 4, against the der the 27 parties entitled under the voluntary settlement, was joined as a coplaintiff; his Honor held, that as the settlement was of personal property it was not within the statute, and that, consequently, the purchaser not having the protection of the statute, could not have a better title than the settlor from whom he purchased, but that if he had shown a good title in himself, he could have had no relief in that suit, having associated himself as co-plaintiff with the settlor; it having been in several late cases decided, that under such circumstances, no decree can be made, although the plaintiff

consistent tities.

ing under inconsistent

titles. Creditors of deceased may

join together.

One creditor may sue on behalf of himself and others.

Persons claim- might, in a suit in which he was sole plaintiff, have been entitled to relief (a).

The rule, that persons claiming under different titles cannot be

joined as plaintiffs in the same suit, does not apply to cases where

their titles, though distinct, are not inconsistent with each other. Thus, all the creditors of a deceased debtor, although they claim under distinct titles, may be joined as co-plaintiffs in the same suit, to administer the assets of the debtor, although it is not necessary that they should be so joined, as one creditor may sue for his debt against the personal estate, without bringing the other creditors before the Court (b). The joining, however, of several creditors in the same suit, although it might save the expense of several suits by different creditors, might nevertheless, where the creditors are numerous, be productive of great inconvenience and delay by reason of the danger which would exist of continued abatements. Courts of Equity have therefore adopted a practice, which at the same time that it saves the expense of several suits against the same estate, obviates the risk and inconvenience to be appreheaded from joining a great number of individuals as plaintiffs, by allowing one or more of such individuals to file a bill on hehalf of themselves and the other creditors upon the same estate, for an account and application of the estate of a deceased debtor, in which case the decree being made applicable to all the creditors, the others may come in under it and obtain satisfaction for their demands as well as the plaintiffs in the suit; and if they decline to do so, they will be excluded the benefit of the decree, and will yet be considered bound by acts done under its authority (c). It is matter rather of convenience than indulgence, to permit such a suit by a few on behalf of all the creditors, as it tends to prevent several suits by several creditors, which might be highly inconvenient in the administration of assets, as well as burthensome to the fund to be administered; for if a bill be brought by a single creditor for his own debt, he may, as at Law, gain a preference by the judgment in his favor over the other creditors in the same degree. who may not have used equal diligence (d) (1).

(a) Bill v. Cuerton, 2 M. & K. 503. (b) Anon. 3 Atk. 572; Peacock v.

Monk, 1 Ves. 127.
(c) Lord Red. 166.
(d) Ibid. Vide Attorney-general v. Cornthwaite, 2 Cox, 45; where it was admitted at the bar that where a single creditor files a bill for the pay-ment of his own debt only, the Court does not direct a general account of the testator's debts, but only an account of the personal estate and of that particular debt, which is ordered to be paid in a course of administra-tion; and all debts of a higher or equal nature may be paid by the exec-utor, and allowed him in his dis-charge. Vide etiam, Gray v. Chischarge. Vide et well, 9 Ves. 123.

⁽¹⁾ Story Eq. Pl. § 99-102; 1 Story Eq. Jur. § 546-550; Brooks v. Reynolds.

The same principle applies where the demand is against the Where persons real as well as the personal assets (e), because, strictly speaking, half of themwhere an estate is liable to several incumbrances, or specialty debts, one incumbrancer, or specialty creditor, cannot sue without bringing the others before the Court, which, when the creditors As well in the are numerous, might be attended with great inconvenience and case of realty as of personexpense (f) (1); and it has been extended to the case of creditors alty. under a trust deed for payment of debts, a few of whom have been permitted to sue on behalf of themselves and the other creditors named in the deed, for the execution of the trusts, although one Creditors uncreditor could not, in that case, have sued for his single demand der trust deed. without bringing the other creditors before the Court (g) (2).

selves and others.

Upon the same principle, where the trust fund was to be dis- Joint and sepatributed amongst the joint and separate creditors of the firm, a bill rate creditors. of this description was permitted by one creditor only, on behalf of himself and the other joint and separate creditors, although it was objected, that one at least of each class ought to have been brought before the Court (h).

(c) Leigh v. Thomas, 2 Ves. 313.
(f) Although in this case one incumbrancer cannot sue without making the rest parties, yet it has been held that this is cured by a decree directing an account to be taken of all the mortgages and incumbrances affecting the estate. Vide Vin. Ab. tit. Party (B.) ca. 51. And in Martin v. Martin, Lord Hardwicke said, that on a bill for a sale for the satisfaction of a bond creditor, not only where it was on behalf of himself and others, but even when the bill was for the satisfaction of his own particular debt, the constant course of the Court was to direct an account of all the bond debts of the testator or intestate, with liberty to come for a satisfaction. Vide Seton on Decrees, 85. It seems, however, upon more recent authorities, that a single bond creditor cannot have any decree at all against the real

Vide Bedford v. Leigh, 2 estate. Dick. 707; Johnson v. Compton, 4 Sim. 47. Where a bill has been filed by a single bond creditor to establish his claim against the real estate of his deceased debtor, the Court has permitted it to be amended by making it a bill "on behalf of himself and of the other specialty creditors." Johnson v. Compton, ubi supra.

(g) Corry v. Trist, Lord Red. 167; see however Harrison v. Stewardson, 2 Hare, 530. Where Sir J. Wigram, V. C., decided, that twenty creditors interested in a real estate, were not so large a number, as that the Court would, on the ground of inconve-nience alone, allow a few of them to represent the others, and dispense with such others as parties in a suit to recover the estate against the whole body of creditors.

(A) Weld v. Bonham, 2 S. & S. 91.

¹ Bro. C. C. (Perkins's ed.) 183, note (2), 185, note (5), and cases cited; Paxton v. Douglas, 8 Sumner's Vesey, 520; Thompson v. Brown, 4 John. Ch. 619; Shephard v. Guernsey, 9 Paige, 357; Ram on Assets, ch. 21, § 1, p. 292; Rush v. Higgs, 4 Sumner's Vesey, 638, note (a), and cases cited; Hallett v. Hallett, 2 Paige, 15; Lloyd v. Loaring, 6 Sumner's Vesey, 773, note (a); West v. Randall, 2 Mason, 181; Lucas v. Bank of Darien, 2 Stewart, 280; New London Bank v. Lee, 11 Conn. 112; Ballentine v. Beall, 3 Scam. 206.

(1) See Story Eq. P1 5 161 page

⁽¹⁾ See Story Eq. Pl. § 161, note. (2) Story Eq. Pl. § 149, § 150, § 207; Bryant v. Russell, 23 Pick. 508; Stevenson v. Austin, 3 Metcalf, 474.

Where persons may sue on behalf of themselves and others.

To marshal assets.

It is to be observed, that in suits for marshalling assets, simplecontract creditors must be joined as plaintiffs, as well as creditors by specialty; for upon a bill by specialty creditors only, the decree would be merely for the payment of the debts out of the personal estate, and if that should not prove sufficient for the purpose, for the sale and application of the real estate. The right to call for such an arrangement of the property as will throw those who have debts payable out of both descriptions of estate upon the real estate, in order that the personalty may be left clear for those whose demands are only payable out of the personal estate, belongs to the simple-contract creditors, who have an equity either to compel the payment of the specialty debts out of the real estate, or else to stand in the place of the specialty creditors, as against the real estate, for so much of the personal estate as they shall exhaust. It is proper, therefore, in bills of this nature, to file them in the names of a specialty creditor and of a creditor by simple contract, on behalf of themselves and of all others the specialty and simple-contract creditors.

Legatees and next of kin.

By analogy to the case of creditors, a legatee is permitted to sue on behalf of himself and the other legatees, because, as he might sue for his own legacy only, a suit by one, on behalf of all the legatees, has the same tendency to prevent inconvenience and expense, as a suit by one creditor on behalf of all creditors of the same fund (i) (1). For the same reason, where it has been sought to apply personal estate amongst next of kin, or amongst persons claiming as legatees under a general description, and it may be uncertain who are the persons answering that description, bills have been admitted by one claimant on behalf of himself and of others equally interested (k) (2).

Joint proprie-tors of a trading undertaking.

But the right of a few to represent the whole is by no means confined to the instances of creditors and legatees (1); and the necessity of the case has induced the Court, especially of late years, frequently to depart from the general rule, in cases where a strict

(i) Lord Red. 166.

(k) Ibid. 138.

(I) See 6 Ves. 779.

In case of an assignment for the benefit of creditors, all the creditors should be joined in a bill to compel a distribution of the fund; but one cred-

should be joined in a bilt to compel a distribution of the rund; but one creditor alone may maintain a bill for a violation of the trust injurious to himself separately. Dimmock v. Bixby, 20 Pick. 368.

(1) Story Eq. Pl. § 104; Brown v. Ricketta, 3 John. Ch. 553; Fish v. Howland, 1 Paige, 20, 23; Kettle v. Crary, 1 Paige, 417, note; Hallett v. Hallett, 2 Paige, 20, 21; ante, 265, 271, note.

(2) Story Eq. Pl. § 105; ante, 220, note.

selves and others.

adherence to it would probably amount to a denial of justice, and Where persons to allow a few persons to sue on behalf of great numbers, having half of themthe same interests (m) (1); thus part of the proprietors of a trading undertaking, where the shares had been split or divided into 800, were permitted to maintain a suit on behalf of themselves and others, for an account against some of their co-partners, without bringing the whole before the Court (n), "because it would have been impracticable to make them all parties by name, and there would be continual abatement by death and otherwise, and no coming at justice, if they were to be made parties;" and so where all the inhabitants of a parish had rights of common Inhabitants of under a trust, a suit by one on behalf of himself and the other in- a parish. habitants was admitted (o); and one owner of lands in a town-Owners of ship has been permitted to sue on behalf of himself and the others lands, to establish a modus. to establish a contributory modus for all the lands there (p) (2). Upon the same principle a bill was allowed by the captain of a Crew of a ship opon the same principle a bill was allowed by the mariners and for prize privateer on behalf of himself and of all other the mariners and for prize money. persons who had signed certain articles of agreement with the owners, for an account and distribution of the prizes made by the ship (q) (3). And in Lloyd v. Loaring (r), Lord Eldon held, that some of the members of a lodge of Freemasons, or of one of the inns of court, or of any other numerous body of persons, might sustain a suit on behalf of themselves and the others for the delivery up of a chattel in which they were all interested.

And in Cockburn v. Thompson (s), which was the case of a bill filed by several persons on behalf of themselves and of all other proprietors of the Philanthropic Annuity Institution, &c.,

(m) Lord Red. 169.
(n) Chancey v. May, Prec. Ch. 592.

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filed by the captain in his own right,

⁽e) Blackham v. The Warden and Society of Sutton Coldfield, 1 Ch. Ca. 269. It has been doubted whether the Attorney-general ought not to have been a party to that suit. Vide Lord Red. 137,

⁽p) Chaytor v. Trinity College, 3 Anst. 841.

⁽q) Good v. Blewitt, 13 Ves. 397. In that case the bill was originally

but was allowed to be amended by introducing the words, " on behalf of himself," &c. (r) 6 Ves. 773. [See Sumner's ed. note (a).]
(a) 16 Ves. 321.

⁽¹⁾ Story Eq. Pl. § 94, et seq., and the cases cited in notes; West v. Randall, 2 Mason, 192-196; Wendell v. Van Rensselaer, 1 John. Ch. 349; Hallett v. Hallett, 2 Paige, 18-20; Cullen v. Duke of Queensberry, 1 Bro. C. C. (Perkins's ed.) 101, and Mr. Belt's notes; Moffatt v. Farquharmon, 2 ib. 338, note (1); ante, 240, note (2); Lloyd v. Loaring, 6 Sumner's Vesey, 773, note (a), and cases cited; Willis v. Henderson, 4 Soam., 20.

(2) Story Eq. Jur. § 121, and cases cited.

(3) West v. Randall, 2 Mason, 193, 194; Story Eq. Pl. § 98.

selves and

others. Subscribers or suit. proprietors of general insti-

Exceptions to rule.

Where plaintiff, and those for whom he sues, only assignees of shares.

Where persons praying that the institution might be dissolved, and an account may sue on be-half of them- taken against the defendant. Lord Eldon overruled a plea, which objected that a great number of persons, whose names were stated. were proprietors of the institution, and ought to be parties to the

> The practice adopted by the Court of permitting one or more persons to represent in a suit all who have similar interests, has been frequently recognized and acted upon in a variety of instances; but it is not to be considered as a general principle, that this course may be acted upon in all cases within the inconvenience which the adoption of this practice has been intended to avoid (1). Where a bill was filed by five persons, on behalf of themselves and the other shareholders in a Joint-Stock Association, not established by Act of Parliament, who had by deed assigned their shares to the plaintiffs, and constituted the plaintiffs their attornies to institute suits, &c., in order to give effect to their claim, but upon trust for themselves, Sir J. Leach, V. C., allowed a demurrer, because the assignors were not parties, although it was stated in the bill that they were very numerous, and that naming them as parties on the record would, in all probability, render it impossible for the plaintiffs to obtain a decree in the cause (t).

Where relief prayed not beneficial to all.

When contract tained (x). sought to be rescinded, not necessarily disadvantageous to all;

It is moreover generally necessary, in order to enable a plaintiff to sue on behalf of himself and others who stand in the same relation with him to the subject of the suit, that it should appear that the relief sought by him is beneficial to those whom he undertakes to represent (u) (2); and where it does not appear that all the persons intended to be represented are necessarily interested in obtaining the relief sought, such a suit cannot be main-Thus, where a plaintiff, being one of the subscribers to a loan of money to a foreign state, filed a bill on behalf of himself and all other subscribers to that loan, to rescind the contracts of subscription, and to have the subscription monies returned,

(t) Blain v. Agar, 1 Sim. 37. (u) Gray v. Chaplin, 2 S. & S. S. & S. 77; Bainbridge v. Burton, 2 Beav. 539. (z) Van Sandau v. Moore, 1 Rus. 465. 267; Attorney-general v. Heelis, 2

⁽¹⁾ The rule, that all parties materially interested in the subject matter of the litigation should be made parties to the suit, cannot be dispensed with where the rights of persons not before the Court are so indispensably connected with the claims of the parties litigant, that no decree can be made without impairing the rights of the former. Hallett v. Hallett, 2 Paige, 15. See ante, 240, note; Story Eq. Pl. § 130, et seq., § 77, § 94.
(2) Story Eq. Pl. § 113, § 131, a.

Lord Eldon held, that the plaintiff was not entitled in that case to Where persons represent all the other subscribers, because it did not necessarily behalf of themfollow that every subscriber should, like him, wish to retire from the speculation, and every individual must, in that respect, judge for himself (y). And upon the same principle, one of the inhabitants of a district, who claimed a right to be served with water, by a public company, cannot file a bill on behalf of himself and the other inhabitants, to compel that company to supply water to the district upon particular terms, because what might be reasonable with respect to one might not be so with regard to the Not unless others (z) (1). Where, however, it is perfectly clear that the ob-sarily reasonject of the suit is for the benefit of all the parties interested, a few able with remay maintain a bill on behalf of themselves and the others, even gard to all. though the majority disapprove of the institution of the suit. Thus where an act complained of was necessarily injurious to the common right, Sir J. Leach, V. C., suffered a few of a large number of persons to maintain a suit on behalf of themselves and the others for relief against it, although the majority approved the act, and disapproved of the institution of the suit (a) (2). Upon the same principle, in Small v. Attwood (b), a few shareholders of a Joint-Stock Company were permitted to maintain a suit on behalf of themselves and other shareholders, for the purpose of rescinding a contract, it being manifest from the evidence that it was for the benefit of all the shareholders that the contract should be rescinded.

selves and others.

claims neces-

The great increase in number of Joint-Stock Companies, and Extension of trading associations in which large classes of persons are jointly modern times. interested, has had the effect in modern times of extending the practice, which allows a few persons to sue in Equity on behalf of themselves and others similarly interested.

In the case of Wallworth v. Holt (c), the bill was filed by the plaintiffs on behalf of themselves and all others, the shareholders and partners of the banking company, called the Imperial Bank

(y) Jones v. Del Rio, 1 Turn. R. ; in which case the plaintiffs had each a separate right to sue, and Lord Eldon also held, that as the plaintiffs could not support their bill, suing on behalf of themselves and others having similar rights, they could not, having three distinct demands, file one bill.

(a) Bromley v. Smith, 1 Sim. 8. (b) 1 Young, 407. (c) 4 M. & C. 635.

⁽z) Weale v. West Middlesex Waterworks, 1 J. & W. 370; and see judgment of Lord Eldon in Beaumont v. Meredith, 3 V. & B. 181.

⁽¹⁾ Story Eq. Pl. § 120, § 123, § 125. (2) Story Eq. Pl. § 114, § 114 a, § 115.

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Persons suing of England, except those who were made defendants. It did not on behalf of themselves and others.

in terms pray a dissolution, or a final winding up of the affairs of the company, but it prayed the assistance of the Court in the realization of the assets of the company, and in the payment of its debts, and that for that purpose a receiver might be appointed, and authorized to sue for calls unpaid and other debts due to the company in the name of the registered officer, who was one of the defendants. To this bill a demurrer was put in, upon the argument of which the two most important objections to the bill were, 1st, That it was not the practice of the Court to interfere between partners except upon a bill praying a dissolution; and 2dly, That all the parties interested in the concern were necessary parties to the bill. Lord Cottenham overruled the demurrer, and in his judgment observed. "The result, therefore, of these two rules, the one binding the Court to withhold its jurisdiction, except upon bills praying a dissolution, and the other requiring that all the partners should be parties to a bill praying it, would be, that the door of this Court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind, would be an absolute denial of justice to a large portion of the subjects of the realm, in some of the most important of their affairs. is quite sufficient to show that such cannot be the law; for, as I have said upon other occasions (d), I think it the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different circumstances, to decline to administer justice, and to enforce rights for which there is no other remedy. This has always been the principle of this Court, though not at all times sufficiently attended to. It is the ground upon which the Court has, in many cases, dispensed with the presence of parties who would, according to the general practice, have been necessary parties (1)."

General principles in cases of partnership.

> In the case of Taylor v. Salmon (e), the plaintiff and three other persons described as directors and co-partners of a certain mining company, on behalf of themselves and all other the copartners of the company, obtained a decree for the specific per-

⁽d) See Mare v. Malachy, 1 My. Milligan v. Mitchell, 3 My. & Cr. Cr. 559; Taylor v. Salmon, 4 My. T3; Hichens v. Congreve, 4 Russ. Cr. 134. & Cr. 559; Taylor v. Salmon, 4 My. & Cr. 134.

⁽e) [4 Myl. & Cr. 134] See also

⁽¹⁾ Story Eq. Pl. § 76 c, § 96, § 115, § 115 a, § 115 b; West v. Randall, 2 Mason, 181; Colt v. Lesnier, 9 Cowen, 320, 330.

formance of a lease to the plaintiffs, according to the terms of an Persons suing on behalf of agreement entered into between the two defendants, one of whom was a shareholder in the company, and was proved to have acted as agent for the plaintiffs in negotiating the lease with his co-defendant; and an objection that such defendant was a shareholder, and that therefore the plaintiffs could not sue on his behalf was overruled (e).

themselves and others.

It does not appear moreover that the fact of a company being Where comincorporated by Act of Parliament, necessarily prevents individual pany incorporated by Act members of the corporation suing on behalf of themselves and the of Parliament other members of the company. In Foss v. Harbottle (f), Sir J. Wigram, V. C., observed, "corporations of this kind are in truth little more than private partnerships; and in cases which may easily be suggested, it would be too much to hold, that a society of private persons associated together in undertakings, which, though certainly beneficial to the public, are nevertheless matters of private property, are to be deprived of their civil rights, inter see because, in order to make their common objects more attainable, the Crown or the legislature may have conferred upon them the benefit of a corporate character. If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking in such a character the protection of those rights to which in their corporate capacity they were entitled; I cannot but think that the principle so forcibly laid down by Lord Cottenham in Wallworth v. Holt (g), and other cases, would apply, and the claims of justice would be found superior to any difficulties arising out of technical rules, respect. ing the mode in which corporations are required to sue."

In all cases, where one or a few individuals of a large number, institute a suit on behalf of themselves and the others, they must Must so deso describe themselves in the bill, otherwise a demurrer or plea for scribe themwant of parties will lie. Thus, where a part of a ship's crew appointed two of their number to be agents, and a bill was filed by such agents in their own name, and not on behalf of themselves and others, a demurrer was allowed for not having made the whole crew parties (A); and where a bill was filed by three partners in a numerous trading company against the members of the committee for managing the trading concerns of the company, it was dismissed, because it was not filed by the plaintiffs "on behalf of

⁽f) 2 Hare, 491; see also Preston v. Grand Collyer Dock Company, 11 Sim. 1.

⁽g) 4 Myl. & Cr, 635. (h) Leigh v. Thomas, 2 Ves. 312.

on behalf of themselves tee (i)." and others.

Persons suing themselves and the other partners not members of the commit-In Hales v. Pomfret (k), Lord Chief Baron Richards said, that properly a bill to establish a modus should be brought by owners and occupiers, on behalf of themselves and of all other owners and occupiers of lands within the parish, and that the Ordinary should be a party (1).

Plaintiff may amend if not so described.

It is to be observed, that the Court will sometimes allow a bill, which has originally been filed by one individual of a numerous class in his own right, to stand over at the hearing, in order that the bill may be amended, so as to make such individual sue on behalf of himself, and the rest of the class (m).

## SECTION II.

Of Necessary Parties to a Suit, in respect of their interest in resisting the Demands of the Plaintiff.

Defendants interested.

tially.

A PERSON may be affected by the demands of the plaintiff in a suit, either immediately or consequentially. Where an individual is in the actual enjoyment of the subject-matter, or has an interest in it, either in possession or expectancy, which is likely either to be defeated or diminished by the plaintiff's claims, in such cases he has an immediate interest in resisting the demand, and all per-Or consequen- sons who have such immediate interests are necessary parties to the suit; but there may be other persons who, though not immediately interested in resisting the plaintiff's demands, are vet liable to be affected by them consequentially, because the success of the plaintiff against the defendants who are immediately interested, may give those defendants a right to proceed against them, for the purpose of compelling them to make compensation, either in the whole or in part, for the loss sustained. Those persons, therefore, as being consequentially liable to be affected by the suit, must frequently also be parties to it. The question, therefore, of who are necessary parties to a suit in respect to their interest in resisting the plaintiff's demands, resolves itself into two; namely, Who are necessary parties, first, in respect of their immediate interest? and secondly, in respect of their consequential interest?

(k) Daniell, Ex. Rep. 142.

(l) Vide acc. Woollaston v. Wright, 3 Anst. 801.

⁽i) Baldwin v. Lawrence, 2 S. & S. 18; and see Douglas v. Horsfall, 2 S. & S. 184.

⁽m) Lloyd v. Loaring; see also Milligan v. Mitchell, 1 M. C. 433; and post, on Amending Bills.

I shall first proceed to consider who are necessary parties to a In respect of suit, in respect of their immediate interest in resisting the plaintiff's what interest. demand. And here it is to be observed, that where parties are Who are necspoken of as having an interest in the question, it is not intended because of beauty to confine the definition to those only who are beneficially inter-escial interested, but it is to be considered as extending to all persons who ests. have any estate, either legal or equitable, in the subject-matter, whether such estate be beneficial to themselves or not.

Under this definition are included all persons who fill the char- Naked trustees acter of trustees of the property in dispute. But the rule is subject to exception, where the party is in the situation of a mere naked trustee, without any estate vested in him, in which case he need not, in general, be made a party. Thus a broker or agent signing a contract in his own name for the purchase or sale of property, is not considered a necessary party to a bill for a specific performance of such contract against his principal  $(\pi)$  (1). And so, where a person having no interest in the matter joins with another who has, in a contract for sale, as where a man having gone through a fictitious ceremony of marriage with a woman, joins with her as her husband in an agreement to sell her property, he is a not a necessary party to a suit to enforce the contract (o).

In all cases however, in which any estate is vested in an indivi- Having esdual filling the character of trustee, or if he has no estate, where tates. the circumstances are such, that in the event of the plaintiff succeeding in his suit, the defendant may have a demand over against him, he is a necessary party. Thus in Jones v. Jones (p), where a plantiff sought to set aside a lease on the ground of fraud, without bringing before the Court the trustees who were parties to the lease, and to whom the fraud was imputed, the objection for want of parties was allowed, because if the plaintiff prevailed, the defendant might have a remedy over against the trustees. Upon the same principle, where the trustees of real estates had conveyed them over to purchasers, it was determined, that on a bill by the cestui que trusts against the purchasers to set aside the conveyance, the trustees were necessary parties (q).

A trustee, however, who is named in the will, but has never Where trusacted, and has released all his interest to his co-trustee, ought not tee under will has not acted!

⁽n) Kingsley v. Young, Coop. Tr. Pl. 42; vide ante, p. 248. (e) Sturge v. Starr, 2 M. & K.

⁽p) 3 Atk. 110. (q) Harrison v. Pryn, Barnard, 324.

⁽¹⁾ Story Eq. Pl. § 231. 25*

what interest.

In respect of to be made a party to a bill to set aside the will on the ground of fraud (r).

Assignee of trustees.

Where a trustee has assigned his interest in the trust-estate to another, it is necessary to have, not only the trustee who has assigned, but the assignee before the Court (1): thus, where a bill was filed by an annuitant to recover the arrear of his annuity, against the heir of the person in whom the estates out of which the annuity was payable, was vested; and it appeared that the heir had assigned his interest in the estate to another, who was a mortgagee of the estate, and had paid the annuity down to a certain period, and had then stopped; it was held that the plaintiff ought to have made the assignee a party; by which means she would have gotten the mortgage deeds, and the Court would then have decreed the assignee to have paid the annuity, and the assignor to stand as a security for having broken the trust (s) (2).

Where one trustee may be sued without others, or their representatives.

It was formerly generally necessary where there were more trustees than one, that they should all be parties if amenable to the process of the Court (t); but this rule has been in some respects modified by the 32nd Order of August, 1841, which enables a plaintiff who has a joint and several demand against several persons to proceed against one or more of the several persons liable without making the others parties (u), — and even before this Order, in some cases where they were merely accounting parties, one might be sued for an account of his own receipts and payments, without bringing the others before the Court (v) (3). where a bill was filed against the representative of one of several trustees who were dead, for an account of the receipts and payments of his testator, who alone managed the trust, without bringing the representatives of the other trustees before the Court, and an objection was taken on that ground, the objection was overruled, because the plaintiff insisted only upon having an account of the receipts and disbursements of the trustee, whose representative was before the Court, and not of any joint receipts or transactions

(r) Richardson v. Hulbert, 1 Anst. 65.

(u) See page 316. v) Lady Selyard v. The Executors

(s) Burt v. Dennet, 2 Bro. C. C. 5. [Perkins's ed. note (a).] (t) Vin. Ab. Party, B. 68.

of Harris, 1 Eq. Ca. Ab. 74. [But see Munch v. Cockerell, 8 Sim. 219;

Story Eq. Pl. § 214, note.

made a party in his stead, and the trustee need not he made a party, unless the assignment is a breach of trust. Story Eq. Pl. § 211, § 213, § 214; Bromley v. Holland, 7 Sumner's Vesey, 3, and note (c); Munch v. Cockerell, 8 Sim. 219.

⁽²⁾ Story Eq. Pl. § 209; Bailey v. Inglee, 2 Paige, 278.(3) Story Eq. Pl. § 214, and note.

Trustees.

by him with the other trustees (1). And so, where a bill was filed by a creditor against the representatives of B. and C. as two trustees of estates conveyed in trust to pay debts, for an account of the produce of the sales and payment of their debts; and the representatives of B. alleged by their answer, that not only C. but D. also were trustees, and that D. had acted in the trust, although they did not know whether he had received any of the produce, Lord Kenyon, M. R., and afterwards Lord Arden, M. R., held D. to be an unnecessary party. The reporter of this case adds a query, because at the bar the general opinion was that D.'s representatives ought to have been parties, nor could one creditor suing, waive, on behalf of absent parties in joint interest with himself, the benefit or possible benefit of any part of the trust fund (z). This query seems to be in accordance with the principles laid down in Williams v. Williams (v).

The rule which requires the trustees of property in litigation Committees of to be brought before the Court, requires the presence of the com- idiots and lumittees of the estates of idiots and lunatics in a suit against the idiots or lunatics committed to their care (z); because, by the grant to them of the estates of such idiots or lunatics, they are constituted the trustees of such estates. Upon the same ground, Assignees of the assignees of bankrupts or insolvents are necessary parties to bankrupts and suits relating to the property of such bankrupts or insolvents (2).

For the same reason, wherever the demand is sought to be satis- In demands fied out of the personal estate of a person deceased, it is necessary against personalty. to make the personal representative a party to the suit. Thus, although, as we have seen, a creditor or a legatee may bring a In suits by bill against a debtor to the testator's estate upon the ground of creditors. collusion between him and the executor (a) (3), yet in all cases of this description, the personal representative must be before the Court. And so, where to a bill for an account of the estate of a person deceased, and to have the same applied to satisfy a debt alleged to be due from him to the plaintiff, the defendants pleaded that they were not executors or administrators of the party whose estate was sought to be charged, nor so stated by the bill, and demurred, for that the executors or the administrators were

(z) Routh v. Kinder, 3 Swan. 144. n.; from Lord Colchester's MSS. (y) 9 Mod. 299.

(z) Lord Red. 31; ante, p. 170. (a) Attorney-General v. Wynne, Mos. 126; vide ante, p. 250.

⁽¹⁾ See Story Eq. Pl. § 207 a, § 212, § 213, § 214, and notes.
(2) See Storm v. Davenport, 1 Sandford, (N. Y.) Ch. 135.

F (3) Post, ch. 6, § 4, and notes to the point, "Legatee or creditor cannot sue debtor to testator's estate."

presentatives.

Personal Re- the proper parties to contest the debt, who might probably prove that it had been discharged, the Court allowed both the plea and demurrer, but gave the plaintiff leave to amend his bill as he might be advised (b).

In suit by specific legatees.

Secus, if rever-

sioner seek to

Upon the same principle, the specific legatee of a term suing for the term, must make the executor a party, even though it is alleged in the bill that the executor had assented to the bequest (c). Where, however, a bill was filed by the reversioner against the legatee of a term, praying that the lease might be declared void, and the defendant insisted, that if the lease was set aside, the plaintiff ought to pay the money expended by the testator in the improvement of the premises, the executor of the testator, who had assented to the bequest, was not considered a necessary party to the suit (d). And where an executor had been outlawed, and a witness proved that he had inquired after but could not find him, it was thought to be a full answer to the objection, that he was not a party to a suit which had been instituted by a creditor of the

rescind lease against specific legatee.

> deceased testator against the residuary legatee (e). Moreover, in some cases, where the fund, the subject of the suit, has been ascertained and appropriated, the Court has dispensed with the appearance of a personal representative to the testator,

Where executor outlawed.

rante minore

etata.

by whose will the fund has been bequeathed (f) (1). Executor du-

The rule which requires the executor to be before the Court in all cases relating to the personal estate of a testator, extends to an executor durante minore atate, even though the actual executor has attained twenty-one, and has obtained probate thereon: thus, where there has been an executor durante minore atate of the daughter of a testator, and after the daughter attained twentyone a bill was brought against her without making the executor durante minore ætate a party, although it was insisted that the daughter, being of full age, was complete executrix ab initio, and had the whole right of representation in her; yet it was held, that the representative durante minore etate, was a necessary party, and that for want of him the cause must stand over (g).

It is to be observed, however, that if the last case of the daugh-

(b) Griffith v. Bateman, Rep. t. Finch, 334, vide acc. Rumney v. Mead, ibid. 303; Attorney-general v. Twisden, ibid. 336. (c) Moor v. Blagrave, 2 Ch. Ca.

(d) Malpas v. Ackland, 3 Russ. 273.

(c) Heath v. Percival, 1 P. Wms. 683. (f) Arthur v. Hughes, 4 Beav. 506; Beasley v. Kenyon, 5 Beav. 544; Bond v. Graham, 1 H. 484.

(g) Glass v. Oxenham, 2 Atk. 121.

⁽¹⁾ Story Eq. Pl. § 214.

ter had received all the testator's personal estate from the hands Personal Repof the executor durante minore state, upon an account between resentatives. them, the objection for want of parties would have been overruled.

The personal representative required, is one resident in Eng. Personal repland, and where a testator appointed persons residing in India must be apand Scotland his executors, and the will was not proved in Eng-pointed in land, but the plaintiff, a gradient filed a hill against the agent of England. land, but the plaintiff, a creditor, filed a bill against the agent of the executors, to whom money had been remitted, praying an account and payment of the money to the Accountant-general for security, a demurrer, because no personal representative of the testator resident within the jurisdiction of the Court was a party, was allowed (A) (1).

And so, where an executor proved the will of his testator in In-Representa-And so, where an executor proved the will of the country, where a suit was instituted against him, for an account of an unadministered part of the England. testator's estate, which had been remitted to him from India, it was held necessary that a personal representative should be constituted in England, and made a party to the suit (i) (2)

It seems, that where an administration is disputed in the Eccle-istration is dissiastical Court, the Court of Chancery will entertain a suit for a puted. receiver to protect the property till the question in the Ecclesiastical Court is decided, although an administration pendente lite might be obtained in the Ecclesiastical Court (k). In such cases

(A) Lowe v. Farlie, 2 Mad. 101; For the method of obtaining limited vide etiam, Logan v. Fairlie, 2 S. & 8. 284.

(i) Bond v. Graham, 1 H. 482; Tyler v. Bell, 2 M. & C. 89; but see Anderson v. Caunter, 2 M. K. 763.

or special administration, where the

executor is abroad, vide ante, p. 253.
(k) Atkinson v. Henshaw, 2 V. &
B. 85; Ball v. Oliver, ibid. 96.

This doctrine, however, seems not to receive a very general sanction. See Story Conf. Laws, § 514 b. The doctrine of the text is best supported by anthority. See Story Confl. Laws, § 514 b, and notes; Boston v. Boylston, 2 Mass. 384; Goodwin v. Jones, 3 Mass. 514; Davis v. Estey, 8 Pick. 475; Davis v. Estey, 8 Pick. 475; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457; M. P. Ch. 457 Dawes v. Head, 3 Pick. 128; Doolittle v. Lewis, 7 John. Ch. 45, 47; McRea v. McRea, 11 Louis. 571; Attorney-general v. Bouwens, 4 Mees. & Welsby,

171.

⁽¹⁾ Story Conf. Laws, § 513, § 514, 514 a, § and notes and numerous cases both English and American there cited; Story Eq. Pl. § 179, and cases cited in notes.

⁽²⁾ Some of the American Courts have gone so far as to hold, that a foreign executor or administrator, coming here, having received assets in noteign executor of administrator, coming here, having received assets in the foreign country, is liable to be sued here, and to account for such assets, notwithstanding he has taken out no new letters of administration here, nor has the estate been positively settled in the foreign state. Swearingen v. Pendleton, 4 Serg. & R. 389, 392; Evans v. Tatem, 9 Serg. & R. 252, 259; Bryan v. McGee, 2 Wash. C. C. 337; Campbell v. Tousey, 7 Cowen, 64. See also Dowdale's case, 6 Coke, 47.

This detains he recent account to many a very general contains.

resentatives. Party entitled to administer refusing.

Personal Rep- the rule requiring a representative to be before the Court, must be dispensed with, there being no person sustaining that character in existence (1). And where a party entitled to administer refuses to take out administration himself, and prevents any one else from doing so, he will not be allowed to object to a suit being proceeded with, because a personal representative is not before the Court. Thus in D'aranda v. Whittingham (1), where the heir of an obligor demurred to a bill by an obligee, because the administrator of the obligor was not a party, the demurrer was overruled, because it appeared that he would not administer himself, and had opposed the plaintiff in taking out administration as the principal creditor; and in a case where the person entitled by law to administration did not take it out, but acted as if she had, receiving and paying away the intestate's property, an objection for want of parties, on the ground that there was no administrator before the Court, was overruled (m).

Generally all executors parties.

Secus, where abroad, in contempt,

or not proving.

Where there are several executors or administrators, they must all be made parties, even though one of them be an infant (x); but this rule may be dispensed with, if any of them are not amenable to the process of the Court (a), or if they have stood out process to a sequestration; and if an executor has not administered he need not be a party (p) (2). Thus, where there were four executors, one of whom alone proved and acted, and a bill was brought against that one, and he in his answer confessed that he had alone proved the will and acted in the executorship, and that the others never intermeddled therein, it was said to be good (q) (3). In that case, however, if the executor who had proved had died, it would not have been sufficient to have brought his executor before the Court, because he would not have represented the original testator; the other executors would still have had a right to prove,

(p) Went. Off. Ex. 95; Strickland v. Strickland, 12 Sim. 463. (l) Mos. 84. (m) Cleland v. Cleland, Prec. Ch. (q) Brown v. Pitman, Gilb. Eq. R.

(a) Sourry v. Morse, 9 Mod. 89; Offey v. Jenny, 3 Ch. Rep. 92. (c) Cowslad v. Cely, Prec. Ch. 83. 75; 16 Vin. Ab. tit. Parties, B. Pl. 19.

ante. 271, 273.

⁽¹⁾ Story Eq. Pl. § 91. (2) So where a bill seeks discovery and relief only against the acts of one of the executors of an estate, it is not necessary to make the other executor a party in the first instance. But it seems a co-executor may be made a party, during the progress of the suit, if it shall prove to be expedient or necessary. Footman v. Pray, R. M. Charl. 291. See ante, 294, 295.

(3) Cramer v Morton, 2 Moll. 108, Clifton v. Haig, 4 Desaus. 330, and 273, 272.

even though they had renounced probate (r). The record, there-Personal Repfore, would not have been complete without a new representative of the original testator.

Wherever an executor has actually administered, he must be Where execumade a party to a suit, although he has released and disclaimed (s). tor releases or disclaime. But where a plaintiff filed a bill against one of two executors, and must be a paralleged in his bill that he knew not who was the other executor, ty. and prayed that the defendant might discover who he was and where he lived, a demurrer for want of parties was overruled (t) (1). And in the case before referred to, where one of two joint executors was abroad, an account was decreed of his own receipts and payments (u) (2).

The cases do not seem to afford a very clear answer to the ques- Representation, under what circumstances in a suit to administer the assets tive of deof a deceased testator or intestate, the plaintiff ought to join with tor. the existing personal representatives such parties as fill the position of administrators or executors of a former representative of the original estate. In the case of Phelps v. Sproule (2), the V. C. of England seems to have decided that a bill of revivor would not Where charge lie against a person who was not in the chain of representation raised against from the original testator, but who was the executor of a former personal representative (3). In Holland v. Prior (v), Lord Brougham however decided, that where an administratrix has received assets of her intestate, her executrix may and ought to be made a defendant to a suit instituted by a creditor of the intestate (4). The most recent case upon the subject is that of Masters v. Barnes (z), in which Sir J. L. Knight Bruce, V. C., seems to have laid it down, that the plaintiff is not compelled to make assignees or personal representatives of a deceased executor parties. The fact of such deceased executor having died insolvent or without having received, would in all cases probably prevent his executors being proper parties.

If a bill is filed against a married woman, who is an executrix Husband of

female executrix or administratrix.

(r) Arnold v. Bleneouse, 1 Cax.

(s) Smithly v. Shuton, 1 Vern. 31. (t) Boyer v. Covert, 1 Vern. 95.

(z) 4 Sim. 321. (y) 1 M. & K. 237. [S. C. 1 Coop. Temp. Brougham, 426.] (z) 2 Y. & C. 616; and see Wil-

(u) Cowslad v. Cely, Prec. in Ch. liams v. Williams, 9 Mod. 299.

(2) Clifton v. Haig, 4 Desaus. 330. (3) See Story Eq. Pl. 382.

⁽¹⁾ Story Eq. Pl. § 92. See Willis v. Henderson, 4 Scam. 20.

⁽⁴⁾ See Story Eq. Pl. § 170, note; Quince v. Quince, 1 Murph. 160.

Personal Rep- or administratrix, her husband must also be a party, unless he has resentatives. abjured the realm (a). In Taylor v. Allen (b), however, Lord Hardwicke granted an injunction to restrain a wife, executrix, from getting in the assets, her husband being in the West Indies, and not amenable to the process of the Court, on the ground, that if she wasted the assets, or refused to pay, a creditor could have no remedy, inasmuch as her husband must be joined as a party to the suit against her.

Co-executor not party, ordered to account in decree.

In a case before Lord Thurlow, where a bill had been filed for an account of the testator's estate, and it was objected that one of the executors was not a party; he was ordered to be introduced into the decree then made, as a party, and decreed to account before the Master, without putting off the cause to add parties (c) (1).

Injunction against several executors dissolved on ap-plication of one.

In Kilby v. Stanton (d), two executors were appointed, one proved and the other declined to act, an action was commenced by the acting executor against the debtor to the testator; and the rule of law requiring all the executors to join, the action was brought in the name of both executors. On a bill filed by the debtor, he obtained the common injunction for want of answer, which went of course against both the plaintiffs at Law. The acting executor subsequently put in an answer, and on an affidavit that the other executor, who resided abroad, refused to act, or to put in any answer, the Court granted an order misi to dissolve the injunction (2).

Effect of executors renouncing where power of sale.

It seems that where a power of sale is given, by a will, to executors, and they renounce probate, they will not be considered necessary parties to the suit; thus, where a testator had devised that his executors should sell his land, and be possessed of the money arising from the sale upon certain trusts mentioned in his will, and made B. and C. his executors, who renounced; whereupon administration, with the will annexed, was granted to one of the plaintiffs, upon a bill brought by the cestui que trust of the purchase money, under the will, against the heir to compel him to join in a sale of the lands; it was objected that there wanted parties, in regard that the executors ought to have been made defendants, for notwithstanding they had renounced, yet the power of

(a) Lord Red. 37. (b) 2 Atk. 213.

is presumed that he appeared, and consented to this order.

(c) Pitt v. Brewster, 1 Dick. 37. It (d) 2 Young & J. 75.

See Footman v. Pray, R. M. Charlt. 291, cited in note, ante, 398.
 Ante, 298.

sale continued in them, and the objection was overruled, there be- Personal Reping only a power and no estate devised to them (d) (1).

resentatives.

It should be noticed, that a query has been added to the decision upon this point by the reporter, and the doubt suggested appears to be justified by the opinion expressed both by Sir Edward Sugden and Mr. Preston, viz., that where a power is given to executors they may exercise it, although they renounce probate to the will (e). It is to be observed, however, that in the case of Keates v. Burton (f), referred to by Sir Edward Sugden (which was a case of a power given by a testator to his trustees and executors, one of whom died, and the other renounced), Sir William Grant, M. R. remarked, "that the power is given to the executors, but they have not exercised it, and they have renounced the only character in which it was competent to them to exercise it" (g).

It is right in this place to recall the attention of the reader to Where perthe rule which has been before noticed, that the executor or ad-sonalty ministrator of a deceased person, is the person constituted by law recovered or to represent the personal property of that person, and to answer charged. all demands upon it, and that, therefore, where the object of a suit is to charge such personal estate with a demand, it is sufficient to bring the executor or administrator before the Court (h) (2); thus it has been held, that in a bill to be relieved touching a Residuary leglease for years, or other personal duty against executors, though atees unneces the executors be executors in trust, yet it is not necessary to make the cestui que trusts or the residuary legatees parties (i) (3). And so where a bill was filed against an executor, to compel the transfer of a sum of stock belonging to his testatrix, and the executor, by his answer, stated that the residuary legatees claimed the stock, the objection for want of parties was held to be untenable (k).

(d) Yates v. Compton, 2 P. Wms. 308.

(e) Sugden on Powers, 174, 4th ed.; 2 Prest. on Abst., 264.

(f) 14 Ves. 434. (g) Vide 1 Williams on Exec. 156. (k) Lord Red. 166.

(i) Anon. 1 Vern. 261; 1 Eq. Ca. Ab. 73, Pl. 13; Lawson v. Barker, 1 Bro. 303; Love v. Jacomb, ibid. [Story Eq. Pl. § 104 and § 140, in notes.

(k) Brown v. Dowthwaite, 1 Mad.

⁽¹⁾ See 4 Kent, (5th ed.) 220, 221, and notes; Ferebee v. Proctor, 2 Dev. & Bat. 439; S. C. 2 Dev. & Bat. Eq. 496; Jackson v. Scauber, 7 Cowen, 187; Peck v. Henderson, 7 Yerger, 18.

(2) See Neale v. Hagthorpe, 3 Bland, 551; Wilkinson v. Perrin, 7 Monroe, 217; Galphin v. M'Kinney, 1 M'Cord, Ch. 294; Story, Eq. Pl. § 140, and note; Pritchard v. Hicks. 1 Paige, 270; Kinlock v. Meyer, 1 Speer, S. C. Ec. 498 C. Eq, 428.

⁽³⁾ Story Eq. Pl. § 140, § 141; Wiser v. Blackley, 1 John, Ch. 437 Dandridge v. Washington, 2 Peters, 377.

Personal Representatives.

Persons having specific liens.

In like manner, where a testator gave different legacies to three, and they were to abate or increase according as the personal es-Pecuniary leg- tate fell short or exceeded; in a bill against the executor by one legatee, the executor pleaded that the other legatees ought to be parties, because the account made with the plaintiff would not conclude them, and he should be put to several accounts and double proof and charge, the plea was overruled (1). It seems, however, that where a person has a specific lien upon the property in dispute, he must be brought before the Court; and upon this ground it was held, that as the specific devisee of a mortgage could not be bound by an account between the mortgagor and the representatives of the mortgagee his testator, he must be a party to a bill to redeem by mortgagor (m). And so where a husband had specifically disposed of his wife's paraphernalia to other persons, on a bill by the wife against the executor for a delivery of them to her, the specific legatees were considered necessary parties (n).

Assignees of bankrupt or insolvent, represent their estates;

and bankrupt or insolvent unnecessary;

unless fraud or colluson charged.

The assignees of a bankrupt or insolvent debtor are also, as has been before stated, the proper parties to represent the estates vested in them under the bankruptcy or insolvency, and therefore, in all cases where claims are sought to be established against the estates of a bankrupt or an insolvent debtor, it is necessary to bring only the assignees before the Court, and the bankrupts or insolvents themselves, or their creditors, are unnecessary parties (o). Thus it has been held, that a bankrupt is not a necessary party to a bill of foreclosure against his assignees (p), and Sir John Leach, V. C., allowed a demurrer, put in by a bankrupt who was made a party to a bill of foreclosure against his assignees. even though there had been no bargain and sale executed by the commissioners (q). It is to be observed, however, that where fraud and collusion are charged between the bankrupt and his assignees, the bankrupt may be made a party, and he cannot demur. although relief be prayed against him. Thus, where a creditor, having obtained execution against the effects of his debtor, filed a bill against the debtor, against whom a commission of bankrupt had issued, and the persons claiming as assignees under the commission, charging that the commission was a contrivance to defeat the plaintiff's execution, and that the debtor having, by per-

⁽l) Haycock v. Haycock, 2 Ch. Ca. 194.

⁽m) Langley v. Earl of Oxford, Amb. 17. Sed vide Serjeant Hill's note of this case, in Blunt's edition of Ambler, Appendix C.

⁽a) Northey v. Northey, 2 Atk. 77.

⁽o) Collet v. Wollaston, 3 Bro. C. C. 228.

⁽p) Adams v. Holberte, Har. Ch. P. 30; Bainbridge v. Pinhorn, 1 Buck. 135.

⁽q) Lloyd v. Lander, 5 Mad. 288.

mission of the plaintiff, possessed part of the goods which had been taken in execution for the purpose of sale, instead of paying the produce to the plaintiff, had paid it to his assignees, a demurrer by the alleged bankrupt, because he had no interest and might be examined as a witness, was overruled (r).

Subject to the above exceptions, and to the rules hereafter referred to with regard to real estates, the rule is, that all cestui que trusts are necessary parties to suits against their trustees, by which their rights are likely to be affected (1). Thus, on a bill for re- Necessary in a demption, the defendant in his answer set forth that he was a trus-demption. tee for A., it was objected to the plaintiff at the hearing, that the cestui que trust should have been made a party, and because it was disclosed in the answer, and he might have amended, the bill was dis-And so in a bill against the heir of a mortgagee to re-

deem, the personal representative must be a party, because he is

the person entitled to the mortgage money, and the heir is only a trustee of the legal estate for him.

In some cases, however, where the cestui que trusts are very Where numer numerous, the necessity of bringing them all before the Court has ous, dispensed with. been dispensed with (2). Thus, where upon a bill brought against an assignee of a lease to compel him to pay the rent, and perform the covenants, it appeared that the assignment was upon trust for such as should buy the shares, the whole being divided into 900 shares, and an objection was taken because the shareholders were not parties; the objection was overruled, as the assignees by dividing the shares, had made it impracticable to have them all before the Court (t) (3). Fomerly the general rule, in cases where real estates were either devised or settled upon trusts for payment of debts or legacies, was, that if the persons to be benefited by the produce of the estate were either named or sufficiently indicated, then that they must be all parties to any suit affecting the estate; if, however, the bill alleged their great number as a reason for not making them all parties, and if the Court were satisfied that the absentees were sufficiently represented by those who were made parties to the record, the presence of all the persons interested

(r) King v. Martin, 2 Ves. J. 641, Vern. 421. N. B. In that case the cited Lord Red. 162.

(s) Whistler v. Webb, Bunb. 53. (t) City of London v. Richmond, 2

(1) Story, Eq. Pl. § 207, § 192, § 193; Helm v. Hardin, 2 B. Monroe, 232.

necessary party.

original lessee was considered a

Cestui que truste.

See post. 319. (3) Story Eq. Pl. § 118.

Cestrii que trusts. would be dispensed with (u); and upon the same principle, where the trusts were for the payment of debts or legacies generally, the trustees alone were allowed to sustain the suit, either as plaintiffs or defendants, without bringing before the Court the creditors or legatees for whom they were trustees (x) (1); and now (as it has been stated) the 30th Order, of August, 1841, enables such trustees of real estate by devise, as have powers of selling and giving discharges, to represent the persons beneficially interested (y).

It seems doubtful, however, whether this Order will apply to

In cases of foreclosure.

cases where a mortgagee seeks to foreclose the equity of redemption of estates which are subject to such trusts (z); before the Order, where the equity of redemption of an estate mortgaged in fee had been conveyed to trustees, upon trust, to sell and pay off incumbrances, and to divide the surplus amongst persons specified in the deed, it was held that the cestus que trusts were necessary parties (a) (2). And in a case in the Court of Exchequer, where there was a devise to trustees to sell, and after payment of debts and legacies, to divide the surplus amongst several persons, and a bill was filed by a person interested in the surplus, to have his share paid to him, it was held, that all the persons interested in the fund must be parties, although the estates had been sold before the bill was filed (b) (3). It is, however, to be observed, that to a suit for the execution of a trust by or against those claiming the ultimate benefit of such trust, after the satisfaction of prior charges, it is not necessary to bring before the Court the persons claiming the benefit of such prior charges; and, therefore, to a bill for application of a surplus, after payment of debts and legacies, or other incumbrances, the creditors, legatees, or other incumbrancers, need not be made parties. And persons having demands prior to the creation of such a trust, may enforce these demands against the trustees, without bringing before the Court the persons interested under the trust, if the absolute disposition of the property is vested in the trustees. But if the trustees have no such power of disposition, as in the case of trustees to convey to certain uses, the persons claiming the benefit of the

Persons interested in surplus, after payment of debts and legacies.

In suits for surplus, after payment, &c.

Creditors and legatees not necessary.

In bill by persons having demands prior to trust deed.

In what cases persons interested under trust necessary.

(z) Lord Red. 174.

(b) Faithful v. Hunt, 3 Anst. 751.

⁽u) Holland v. Baker, 3 H. 68; Harrison v. Stewardson, 2 H. 530.

 ⁽y) See page 268.
 (z) Wilton v. Jones, 2 Y. & C. 244.

⁽s) Vide etiam, Osbourn v. Fallows, 1 R. & M. 741; Calverley v. Phelp, Mad. &. Geld. 231.

⁽¹⁾ See Stevenson v. Austin, 3 Metcalf, 474, 480; cited post, 267.

⁽²⁾ Story Eq. Pl. § 207, and cases cited in notes.(3) Story Eq. Pl. § 206.

trust must also be parties. Persons having specific charges on the trust property are also necessary parties; but this will not extend to a general trust for creditors or others, whose demands are Also those not specified in the creation of the trust, as their number, as well having specific as the difficulty of ascertaining who may answer a general description, might greatly embarrass a prior claim against a trust property (c) (1).

Castui oue trusta.

Where, however, the demands and names of the creditors, al- When subsethough not actually specified at the time of the creation of the trust, quently ascer are subsequently ascertained by their signing a schedule to the tained. conveyance, they will become necessary parties; thus where a plaintiff claiming an annuity charged upon an estate which had subsequently been demised to trustees for the benefit of such of the grantee's creditors as should execute the conveyance, filed a bill, against the grantor and the trustees, and one of the creditors who had executed the deed, and who had obtained a decree in an original suit, instituted by him on behalf of himself and all other the creditors under the trust deed, praying an account of what was due to him, and that the priorities of himself and the other creditors might be ascertained, and that he might redeem the securities which were prior to his own, and have the benefit of the decree as to that part of the demand for which he should not be entitled to priority over the trust deed; it was held by the V. C. of England, that all the creditors who had executed the trust deed were necessary parties; and that, as it was stated in the bill that several of the creditors had executed the deed, and only one was made a party, the defect appeared sufficiently on the face of the bill to entitle the defendant to take advantage of it by demurrer (d) (2).

Where the money secured by a mortgage is subject to a trust, All interested a mortgagor, or any person claiming under him, seeking to redeem in money secured by mort the mortgagee, must make all persons claiming an interest in the gage. mortgage money parties to the suit. Thus, where it appeared that the parties against whom the redemption was prayed were trustees for a woman and her children, the Lord Chief Baron held, that the cestui que trusts were necessary parties to the suit; although under the peculiar circumstances of the case, and to avoid delay and

⁽c) Lord Red. 174. Sim. 574; (d) Newton v. Earl of Egmont, 4 S. C. S. P. Lord Red. 174. Sim. 574; vide etiam, 5 Sim. 130,

Story Eq. Pl. § 216.
 Story Eq. Pl. § 133, § 149.

deem.

Assignment by mortgagee for benefit of his family.

expense, he recommended that a petition should be presented on their behalf, praying that their interests might be protected, and directed the cause to stand over for that purpose (e) (1). general it may be laid down as a rule, that there can be no foreclosure nor redemption unless all the parties entitled to the mortgage money are before the Court (f) (2). Therefore, where a mortgagee had assigned the mortgage upon certain trusts for the benefit of his family, the mortgagee, the trustees, and the cestui que trusts, were considered necessary parties to a bill to redeem (g). And so where a mortgage term had been bequeathed to trustees, upon trust, to sell and apply the produce among the testator's twelve children and a grandchild nominatim; it was held, that all the cestui que trusts, interested in the produce of the term, were necessary parties, although they were numerous, and the property small, and although the trustees had power to give a discharge to purchasers (h).

But where a mortgagee, who has a plain redeemable interest,

makes several conveyances upon trust, in order to entangle the

Where assignment is to entangle will.

affair, and to render it difficult for a mortgagor, or his representatives, to redem, there it is not necessary that the plaintiff should trace out all the persons who have an interest in such trust, to make them parties: the persons having the legal estate, however, must be before the Court, and where a mortgagee in fee has made an absolute conveyance with several limitations and remainders over, the decree cannot be complete without bringing before the Court, at least the first tenant in tail, and those having intermediate estates (i). It seems that where a mortgage is forfeited, and the mortgagee exercises the legal rights he has acquired by Costs of claim- disposing of, or encumbering the estate, and the mortgagor comes for the redemption, which a Court of Equity gives him, it must be upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts; upon this principle, Sir John Leach, in the case of Wetherell v. Collins, above referred to, ordered the mortgagor to pay the costs of the trustees, and cestui que trust, who were necessarily brought before the Court in consequence of the assignment of the mortgagee.

ants under mortgagee.

⁽h) Osbourn v. Fallows, 1 R. & M. 741. (f) Palmer v. Earl of Carlisle, 1 S & S. 423.

⁽i) Yates v. Hambly, 2 Atk. 238. (g) Wetherell v. Collins, 3 Mad. 255. [Story Eq. Pl. § 192]. [Story Eq. Pl. § 194, § 198, § 144-146].

Story Eq. Pl. § 192, § 208.
 Story Eq. Pl. 182, et seq.

It seems formerly to have been considered necessary, that a In suits to remortgagee, who had assigned his mortgage, should be made a party to a bill of redemption (k), but the law upon the point ap-Mortgagee unpears now to be otherwise; and it has been determined, that where necessary there has been an assignment, even though it was made without gage assigned. the previous authority of the mortgagor, or his declaration, that so much is due, the assignee is the necessary party (1) (1); for whatsoever the assignee pays without the intervention of the mortgagor, he can claim nothing under the assignment but what is actually due between the mortgagor and mortgagee (m) (2). Where a mortgagor is a party to an assignment of a mortgage by the mortgagee, then it is in fact a new mortgage between the mortgagor and the assignee, and of course the original mortgagee is not a necessary party to a bill to redeem; a mortgagor, however, cannot be bound by any transaction which may take place between a mortgagee and his assignee without his privity; if, therefore, the mortgagee, before assignment, has been in possession, and has received more on account of the rents and profits than the principal and interest due upon the mortgage, and a bill is filed by the May be party mortgagor against the assignee to have an account of the overplus, to account for rents received. he may make the mortgagee a party to the bill, because he is clearly accountable for the surplus rents and profits received by himself. But upon the principles laid down by Lord Eldon, in the preceding case (n), it would seem, that even in that case the assignee only would be sufficient, because, having contracted to stand in the place of the original mortgagee, he has rendered himself liable to have the account taken from beginning to end, and must be answerable for the result. From the same case it appears, that although there may have been twenty mesne assignments, the

⁽m) Ibid. 265. (k) Anon. in the Duchy, 2 Ex. Ca. Ab. 594, Pl. 3. (n) Chambers v. Goldwin, 9 Ves. (l) Chambers v. Goldwin, 9 Ves. 268, 269.

⁽¹⁾ Where a mortgage has been absolutely assigned, it is not necessary to (1) Where a mortgage has been absolutely assigned, it is not necessary to make the mortgagee a party to a bill brought by the mortgagor to redeem. Whitney v. M'Kinney, 7 John, Ch. 144. So where there has been more than one assignment of the mortgage, it is sufficient to make the last assignee a party to a bill to redeem. Story Eq. Pl. § 184.

But where a mortgage was assigned to secure a loan made to the assignor, the assignor was held to be a necessary party in a suit commenced by the assignee, to foreclose the mortgage, although the assignment was absolute in terms, and expressed the payment of a full consideration. Kettle v. Van Dyck, 1 Sandford, (N. Y.) 76.

(2) See Matthews v. Walwyn, 4 Sumner's Vesey, 118, note (a).

Cestui que trusta.

Derivative mortgagees. person to whom the last has been made is the only necessary party to the redemption (o) (1).

Where, however, there are several derivative mortgages, if the mortgagor seeks to redeem the first, he must make all the subsequent mortgagees parties, because they are all interested in the account (p)(2).

Persons entitled to resulting trusts.

The rule which requires that all cestui que trusts should be before the Court in suits relating to trust property, applies to resulting trusts as well as others. Thus, where there is a grant or devise of a real estate, either by deed or will, and the whole equitable interest is not thereby granted or devised, there will be a resulting trust for the grantor or his heir (3); and in such case it will be necessary, in a suit relating to that estate, to bring the grantor or his heir before the Court.

Heir of grant-or in informations for charities.

Upon this principle it has been held, that in cases of charities, where a private founder has appointed no visitor, his heir at law is considered a necessary party to an information for the regulation of the charity, because in such case the heir at law of a private founder is considered as the visitor. But in a case of this description, the Court refused to dismiss the information because of his absence, and directed an inquiry for him to be made by the Master (q); and so in the case of a charity, wherever it is doubtful whether the heir is disinherited or not, he must be a party (r) (4).

Owner of inheritance;

necessary in bills by specialty credi-

but not to recover arrears of annuity.

tors,

Wherever a real estate is to be recovered, or a right is sought to be established, or a charge raised against real estate, it is necessary that the person or persons entitled to the inheritance should be before the Court. Upon this principle it is, that in a bill by a specialty creditor, to obtain payment of his demand out of the real estate of his debtor, the heir, as well as the executor. is a necessary party. Where, however, the arrears of an annuity. charged upon real estates, are sought to be recovered, if the arrears are such only as were due in the lifetime of the ancestor.

(o) Chambers v. Goldwin, 9 Ves. 268.

(p) Hobart v. Abbot, 2 P. Wms. 643, ante, p. 243.

(q) Attorney-general v. Gaunt, 3 Swan. 148, n. (r) Attorney-general v. Green, 2 Bro. C. C. 495; see ante, p. 261; Order XXXI, August, 1841.

⁽¹⁾ Story Eq. Pl. § 189.
(2) Kettle v. Van Dyck, 1 Sandford, (N. Y.) 76; ante, 243, 244, and notes; Story Eq. Pl. § 191, § 193, § 199.
(3) See Ripley v. Waterworth, 7 Sumner's Vesey, 425, Perkins's note (c) and cases cited; 2 Story Eq. Jur. § 1196, et seq., and notes; Scott v. Fenhoulett, 1 Bro. C. C. (Perkins's ed.) 70, note (s).
(4) See Story Eq. Pl. § 180.

it will be sufficient to make his personal representative a party, but Owner of Infor any arrears after his death, the heir must be a party (s) (1).

heritance.

The same rule applies to all cases where the jurisdiction is To establish a drawn from the Courts of Common Law, in order to establish a custom; right against a person having a limited estate in land or other hereditaments; and it is in such cases always held necessary to have the owner of the inheritance before the Court. Thus, where a bill was filed to establish a custom whereby the owners and occupiers of certain lands were obliged to keep a bull and a boar for the use of the inhabitants of the parish, it was held that a custom which binds the inheritance of lands can never be established in a Court of Equity unless the owners of the inheritance are parties, and that the master and fellows of Queen's College, who were the owners, ought to have been there (t). And so, where a man pre- to establish a fers a bill to establish a modus against a lessee of an impropriator, modus. he must make the owner of the impropriation a party; for this Court will not bind the inheritance of any person, unless such person is a party (u). Upon the same principle, where a bill is filed to establish a modus, or customary payment, against an ecclesiastical rector, the patron and ordinary are necessary parties (z), the Ordinary, former because the right of presentation which belongs to him where neceswould be affected by the decree, the latter because his presence in the suit protects the right of the church against collusion (v). In Hales v. Pomfret (z), Lord Chief Baron Richards said that he had never known an instance of a bill to establish a modus, to which the ordinary was not a party, being brought to a hearing without its being ordered to stand over for the purpose of making him a party by amendment (a). Upon the same ground, where a bill was filed to establish a modus against a dean and chapter, as impropriators, the ordinary and patron were considered necessary parties (b).

It is to be observed, that to render the owner of the inheritance Owner of innecessary, the object of the suit must be to bind the inheritance; heritance, not necessary. if that is not the case, and the relief sought is merely against the present incumbent, the owner of the inheritance, if made a party,

- (s) Weston v. Bowes, 9 Mod. 309.
  (t) Spendler v. Potter, Bunb. 181.
  (u) Glanvil v. Trelawney, Bunb.
- (z) Gordon v. Simpkinson, 11 Ves.
  - (y) Cook v. Butt, Mad. & Geld. 53.
- (z) Daniell, Ex. Rep. 142.(a) As to making an impropriator a party to a bill for tithes by a vicar, or a vicar a party to a bill by an impropriator, vide ante, p. 279.

  (b) De Whelpdale v. Milburn, 5
- Price, 485.

Owner of Inheritance.
Where suit merely possessory.
But for tithes

may be

brought be-

fore Court.

may demur (c); and so, if in a bill for an account of tithes against an occupier, the owner of the land is made a party (d), he is entitled to have the bill dismissed against him, though if he mixes in the defence, &c., the dismissal will be without costs (c).

It seems, from the judgment of the Court of Exchequer, as delivered by Sir William Alexander, C. B., in the case of Day v. Drake (f), that a parson suing for tithes may, if he please, make the owner as well as the occupier of the land in respect of which the tithe is claimed, a party to the suit, although the occupier could not have insisted that, of necessity, he ought to have been brought before the Court. It must depend, however, upon a great variety of circumstances what the effect of making him a party may be (g); and if the person claiming tithes chooses to make the landowner a party, he must do it at the hazard of not receiving the costs, though he should get a decree against the occupier, or of paying them, according to the circumstances of the case. In the above case of Day v. Drake, the owner having been made a party to the suit, on the allegation that he had got certain documents into his possession, from his tenants and other persons, for the purpose of preventing the plaintiff from obtaining evidence from them in support of his demand, had put in a demurrer to the discovery sought by the bill, and the demurrer was overruled, on the ground that the owner ought to have denied the allegations in The owner afterwards put in a less extensive demurrer to that part of the bill which required a discovery from him as to his title, &c., and an answer denying the allegations that he had taken possession of the documents, &c., for the purpose of preventing the plaintiff from obtaining evidence in support of his claim against the occupiers; and the second demurrer was, upon argument, also overruled, principally upon the ground above stated, viz. that a person suing for tithes has a right, if he choose to incur the risk, to make an owner a party to the suit, although the defendant has no right to insist upon his being so.

Defendant sued for tithes by a lessee, cannot make lessor a defendant to a cross bill.

It is to be observed, however, that although, in a bill by a party entitled to tithes, he may make the owner as well as the occupier a party, yet if the party entitled, sue only in the character of lessee, the occupier has no right to file a cross bill against the lessor for a

ham v. Smith, 11 Price, 126.

⁽t) Williamson v. Lord Lonsdale, Daniell's Ex. Rep. 171.

⁽d) Ibid. (e) Markham v. Smith, 11 Price, 126.

⁽f) 3 Sim. 64 82. (g) Vide Petch v. Dalton, 8 Pri. 9; Leathes v. Newitt, 8 Pri. 562; Bennett v. Sheffington, 4 Pri. 143; Mark-

discovery and production of documents, and that a demurrer to a Tenants and bill of this nature was allowed (A).

Occupiers.

Where the object of a bill is to establish a right to the payment In suits to esof a certain gross sum in lieu of the tithes of a certain portion of tablishe a land, the owner as well as the occupier is necessary, though it lieu of tithes seems that in a case of this description, where the object of the of a particular bill was to establish a right to the payment of 401. per annum, which had been decreed in the time of Charles the First (i) out of Occupies not particular lands; it was held not necessary to make the occupiers necessary. parties, because although the decree in such case could only be against the landowners who were before the Court, yet that would affect lands. And it was decreed that a commission should go to inquire into and ascertain the value of the lands, the owners and occupiers' names, and what proportion of the 40l. per annum each tenement ought to pay.

In the case of Penn v. Lord Baltimore (k), which was a suit for In suits to seta specific performance of an agreement respecting the boundaries unnecessary. of two provinces in America, it was considered unnecessary to make the planters, tenants, or inhabitants within the districts, parties to the suit. The objection taken was upon the ground that their privileges, and the tenure and law by which they held, might not be altered without their consent; but Lord Hardwicke overruled the objection, saying, "Consider to what this objection goes, in lower instances; in the case of manors and honors in England which have different customs and bye-laws frequently; yet, though different, the boundaries of these manors may be settled in suits between the lords of these manors without making the tenants parties, or may be settled by agreement, which this Court will decree, without making the tenants parties; though in case of fraud, collusion, or prejudice to the tenants, they will not be bound."

And, in general, it may be stated as a rule, that occupying ten- Also occupyants under leases, or other persons claiming under the possession suits for land. of a party whose title to real property is disputed, are not deemed necessary parties; though if he had a legal title, the title which they may have gained from him cannot be prejudiced by any decision on his rights in a Court of Equity in their absence; and though, if his title was equitable merely, they may be affected by a decision against that title. Sometimes, however, if the existence Decree withof such rights is suggested at the hearing, the decree is expressly out prejudice

⁽a) Tooth v. The Dean and Chap-r of Canterbury, 3 Sim. 49. Eq. Rep. 320; Vin. Ab. tit. Party, B. fol. 255, Pl. 58. ter of Canterbury, 3 Sim. 49. (i) Cuthbert v. Westwood, Gilb. (k) 1 Ves. 244-9.

Manor.

made without prejudice to those rights, or otherwise qualified according to circumstances. If, therefore, it is intended to conclude such rights by the same suit, the persons claiming them must be made parties to it; and where the right is of a higher nature, as a mortgage, the person claiming, as we have seen, is usually made a party (1). And where a tenant in common had demised his undivided share for a long term of years, the lessee was held a necessary party to a bill for a partition, because he must join in the conveyance, and his lessor was ordered to pay his costs (m).

Secus, in cases of partition.

Lord of manor necessary, in questions of copyhold.

The same principle which renders it necessary that the owner of the inheritance should be before the Court in all cases in which a right is to be established against the inheritance, requires that in cases where there is a dispute as to whether land in the occupation of a defendant is freehold or copyhold, the lord of the manor should be a party. Thus, where a plaintiff, by his bill, pretended a title to certain lands as freehold, which lands the defendant claimed to hold by copy of court roll to him and his heirs, and prayed in aid the lord of the manor; but nevertheless, the plaintiff served the defendant with process to rejoin, without making the lord of the manor a party; it was ordered that the plaintiff should proceed no more against the defendant before he should have called the lord in process (n).

Necessary in suits for a surrender of copyholds for lives.

For a similar reason it is held, that where a bill is brought for the surrender of a copyhold for lives, the lord must be made a party; because, when the surrender is made, the estate is in the lord, and he is under no obligation to regrant it; but it is otherwise in the case of copyholders of inheritance, there the lord need not be a party.

Secus, of copyitance.

It may be observed in this place, that the same rule which has holds of inher- been before laid down (o), with regard to the persons to be made parties as being interested in the inheritance of an estate, prevails equally in the case of adverse interests, as in that of concurrent interests with the plaintiffs: this rule is, that wherever the inheritance to a real estate is the subject-matter of the suit, the first person in being who is entitled to an estate of inheritance in the property, and all others having intermediate interests, must be defendants. Thus it is held necessary, in order to obtain a complete decree of foreclosure, in cases where the equity of redemption is

⁽l) Lord Red. 175.

⁽m) Cornish v. Gest, 2 Cox. 27.

^(%) Cited in Lucas v. Arnold, Ca-

ry. Rep. 81; Vin. Ab. tit. Party, B. 254. Pl. 46.

⁽o) Ante, p. 273, [274, and cases cited1.

the subject of an entail, that the first tenant in tail of the equity Lord of the of redemption should be before the Court (p) (1).

It appears to have been held formerly, that a decree of foreclosure First tenant in against a tenant for life would bar a remainder-man (q), but it is tail, in suits concerning now settled, that not only the tenant for life, but the person hav-realty. ing the next vested estate of inheritance, must be parties (r); and the same rule applies to all cases where a right is to be established, foreclose; or a charge raised against real estates which are the subject of or to charge. settlement.

— either to

A plaintiff, however, has no right to bring persons in the situa- Not in question of remainder-men before the Court in order to bind their tions between rights, upon a discussion whether a prior remainder-man, under purchaser. whom he claims, had a title or not, merely to clear his own title as between him and a purchaser. This was decided in Pelham v. Gregory (s), before Lord Northington; in which case the question arose on the title to certain leasehold estates, which were limited in remainder, after limitations to the Duke of Newcastle and his sons, to the first and other sons of Mr. Henry Pelham in tail, and to which the plaintiff, Lady Catherine Pelham, claimed to be absolutely entitled on the death of the Duke, as administratrix, to Thomas Pelham, the son of Mr. Henry Pelham, the first tenant in tail who had come into being. The plaintiff, in order to have this question decided against Lord Vane and Lord Darlington, who were subsequent remainder-men in tail, contracted to sell the estate, subject to the Duke's life estate, and to the contingency of his having sons, to the defendant Gregory, and brought a bill against him for a specific performance, to which she made Lord Vane and Lord Darlington parties; but Lord Northington dismissed the bill with respect to Lord Vane and Lord Darlington, and the reason his Lordship gave for dismissing the bill against the two latter, as expressed in his decree, was, "that they being remainder-men after the death of the Duke of Newcastle, if he should die without issue, their claims were not within his cognizance to determine, and the plaintiff had no right to bring them into discussion in a Court of Equity." From this decree there was an appeal to the House of Lords, and although they decreed

⁽p) Reynoldson v. Perkins, Amb. (r) Sutton v. Stone, 2 Atk. 101. (q) Roscarrick v. Barton, 1 Ch. S. C. a. 217.

⁽¹⁾ Story Eq. Pl. § 144, § 198.

tions in Settlement.

Under Limita- Gregory to perform his contract, they affirmed the dismissal against Lord Vane and Lord Darlington. In Devonsher v. Newenham (t), Lord Redesdale, after stating the above case and decision, says, "I take this to be a decisive authority, and if the books were searched, I have no doubt many other cases might be found where bills have been dismissed on this ground."

Persons in remainder after first estate of inheritance, unnecessary.

The owner of the first estate of inheritance, however, is sufficient to support the estate, not only of himself, but of every body in remainder behind him (u); therefore, where a tenant in tail is before the Court, all subsequent remainder-men are considered unnecessary parties. This is by analogy to the rule at Law, according to which there is no doubt that a recovery in which a remainder-man in tail was vouched, might bar all remainders behind (x) (1).

Unless nature of estate doubtful.

But although where there is a clear tenancy in tail, there is no occasion for a subsequent remainder-man being a party to a bill of foreclosure, yet where it is doubtful whether a particular party has an estate tail or not, the person who has the first undoubted vested estate of inheritance ought to be a party (v).

Intermediate tenants for life

It is necessary, however in cases of this sort, not only that he who has the first estate of inheritance should be before the Court, but that the intermediate remainder-men for life should be parties (2). The same rule will, as we have seen before, apply, where the inter-

Contingent remainder-men.

mediate estate is contingent or executory, provided the person to take is ascertained; although where the person to take is not ascertained, it is sufficient to have before the Court the trustees to support the

Trustees to preserve, &c.

contingent remainders, and the person in esse entitled to the first vested estate of inheritance (a). Executory devises to persons not in being may in like manner be bound by a decree against a vested estate of inheritance, but a person claiming under limitations by way of executory devise, not subject to any preceding vested es-

tate of inheritance by which it may be defeated, must be a party to a bill affecting his right (b); and in general, where a person is seised in fee of an estate, having that seisin liable to be defeated by a shifting use, conditional limitation, or executory devise, the

Executory deises.

> (u) Reynoldson v. Perkins, Amb. 564. (t) 2 Sch & Lef. 210.

> (z) Per Lord Eldon, in Lloyd v. Johnes, 9 Ves. 64; vide etiam, Gif-ford v. Hort, 1 Sch. & Lef 386.

(y) Powell on Mortgages, 1054.

(z) Per Lord Eldon, in Gower c. Stacpoole, 1 Dow. 18, 32. (a) Lord Cholmondeley v. Lord Clinton, 2 Jac. & W. 7, and 133; Hopkins v. Hopkins, 1 Atk. 590.

(b) Lord Red. 174.

inheritance is not represented in Equity merely by the person who Under Limitahas the fee liable to be defeated, but the persons claiming in contingency upon the defeat of the estate in fee are necessary parties (c). The importance of this rule may hereafter be increased by the operation of the stat. 7 & 8 Vict. c. 76, the recent Act "to simplify the Transfer of Property;" the 8th section of which abolishes contingent remainders, and enacts that estates of that description shall take effect as executory devises.

If after a cause has proceeded a certain length, an intermedia- Intermediate ate remainder-man comes into esse, he must be brought before the men coming Court by supplemental bill (d); and so, if first tenant in tail, who into esse after is made a party to a suit, dies without issue before the termination bill filed. of the suit, according to the constant practice of the Court, the suit is proceeded in against the next tenant in tail, as if he had been originally a party; and this is done by means of a supplemental bill. It seems also clear, that if a tenant in tail is plaintiff Effect of tenin a suit, and dies without issue, the next remainder-man in tail, ant in tail dyalthough he claim by new limitation, and not through the first ing during suit, without plaintiff as his issue, is entitled to continue the suit of the former issue. tenant in tail by supplemental bill, and to have the benefit of the evidence and proceedings in the former suit (e) (1).

The general rule requiring all persons interested in resisting All persons lithe plaintiff's demands to be brought before the Court as defend- able to contribute to plainants, in order to give them an opportunity of litigating the claim tiff's demand. set up, formerly rendered it imperative, wherever more than one person was liable to contribute to the satisfaction of the plaintiff's claim, that they should all have been made parties to the suit (f). This application, however, of the general rule has been materially modified by the 32nd Order of August, 1841, which is, that in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be Principals and necessary to bring before the Court as parties to a suit concern-sureties. ing such demand all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable.

It will, however, be necessary shortly to state what was the practice previous to this Order, inasmuch as it will still apply to all cases not brought precisely within its terms.

⁽c) Goodess v. Williams, 2 Y. & C. 598. (e) Lloyd v. Johnes, 9 Ves. 59. (f) Jackson v. Rawlins, 2 Vern. (d) Per Lord Eldon, in Lloyd v. 195. Johnes, 9 Ves. 59.

⁽¹⁾ Story Eq. Pl. § 144, § 146, and notes.

Persons jointand severally liable.

In the case of Madox v. Jackson (g), Lord Hardwicke said, "The general rule of the Court to be sure is, where a debt is joint and several, the plaintiff must bring each of the debtors before the Court, because they are entitled to the assistance of each other Another reason is, that the debtors are in taking the account. entitled to a contribution, where one pays more than his share of the debt; a further reason is, if there are different funds, as where the debt is a specialty, and he might at Law sue either the heir or executor for satisfaction, he must make both parties, as he may come in the last place upon the real assets (1); but there are exceptions to this, and the exception to the first rule is, that if some of the obligors are only sureties, there is no pretence for the principal in the bond to say, that the creditor ought to bring the surety before the Court, unless he has paid the debt (2). It may here be observed, that by the terms of the Order, no distinction is made between principals and sureties, so that it would appear as if the plaintiff might file his bill against one or more of the sureties, without making the principal a party to the suit. In Allen v. Houlden (h), however, where one of two sureties who had joined the principal debtor in a bond, filed a bill to set aside the transaction on the ground of fraud, and praying an account of the payments made in respect of the bond; Lord Langdale, M. R., held, that notwithstanding the order, the principal debtor and co-surety were necessary parties. And so in Pinkus v. Peters (i), where the plaintiff alleged that he had accepted bills of exchange without consideration, and that he had been sued upon them, and by his bill, prayed relief against the drawer and the holder, without making a person to whom the drawer had indorsed the bill a party, Lord Langdale held, that as there was an allegation that the holder of the bills was a trustee as well for the drawer as also for the indorsee, such intervening indorsee was a necessary party to

The rule, moreover, does not apply to any case where the demand is not joint and several; and therefore, where there is only a joint demand, the old practice continues, and all the persons liable must be made parties. Thus, if there be a demand against a partnership firm, all the persons constituting that firm must be before the Court; and if any of them are dead, the representa-

⁽g) 3 Atk. 106. (h) 6 Beav. 148.

⁽i) 5 Beav. 253.

Story Eq. Pl. § 169.
 Story Eq. Pl. § 169.

tives of the deceased partners must be likewise made parties (1). Persons jointly Thus, where a bill was filed by the captain of a ship, against the personal representative of the survivor of two partners, who were joint owners of the ship, for an account and satisfaction of his demand, it was held that the suit was defective, because the representatives of the other partner, who might be interested in the account, were not before the Court; although, as the demand would have survived at Law, the case there might have been different (k) (2).

Although, even before the 32nd Order, of August, 1841, it was not generally necessary, in a suit against the principal, to make the surety a party; yet where a person had executed a conveyance, or created a charge upon his own estate, as a collateral security for another, he became a necessary party to a suit against the princi-This appears to have been the result of the determination In bills of in Stokes v. Clendon (1), which was the case of a mortgage by a foreclosure, owner of esprincipal of one estate, and by the surety of another, as a collateral tate mortgaged security; and the Master of the Rolls determined, that a bill of as collateral foreclosure against the principal could not be sustained, without to bill against making the other mortgagor a party, because the other had a principal. right to redeem and be present at the account, to prevent the burthen ultimately falling upon his own estate, or at least falling upon it to a larger amount than the other estate might be deficient to satisfy. There has been no decision on the point, but it does not appear that the 32nd Order has made any alteration in this respect; so that it may be considered still necessary to make the owner of an estate mortgaged as collateral security a party to a bill against the principal.

In Stokes v. Clendon, it is to be observed, that the surety had Secus, person conveyed his own estate by way of security to the mortgagee. executing se-Where, however, he merely enters into a personal covenant as eral and meresurety for the principal, but does not convey any estate or interest ly personal. to the mortgagee, there he will not be considered as a necessary party: and where A. having a general power of appointment over an estate, in the event of his surviving his father, joined with two

(k) Pierson v. Robinson, 3 Swan. (l) Cited 2 Bro. C. C. 275, notis, 139, n. Edit. Belt.

security party

liable.

⁽¹⁾ Story Eq. Pl. § 166, § 167, § 168; Moffat v. Farquharson, 2 Bro. C. C. (Perkins's ed.) 338 and notes; Story, Partnership, § 449; 1 Story Eq. Jar. § 466.

In case of a dormant partner, the plaintiff has his election to make him defendant or not. Hawley v. Warner, 4 Cowen, 717.

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Persons jointly other persons as his sureties in a covenant, to pay an annuity to Persons jointly outer productiff; and also covenanted, that he would create a term in and severally the plaintiff; and also covenanted, that he would create a term in the estate if he survived his father: and upon the death of his hable. father a bill was filed by the plaintiff against A., and other parties interested in the estate, to have the arrears of his annuity raised and paid; it was held upon demurrer, that the sureties were not necessary parties (m).

In suits for contribution. Principal and co-sureties, or their personal representatives, though insolvent.

In a bill by one surety against another, to make him contribute, it was held, that the executor of a third surety who was dead ought to be a party, though he died insolvent (n) (1). In that case the principal had given a counter-bond of indemnity to the plaintiff, who had taken him in execution upon it, and he had been discharged by an Insolvent Act; and though he appears not to have been made a party, yet no objection was taken (o); and it seems

Unless insolvency proved or admitted. that from this circumstance, and also from the case of Lawson v. Wright (p), that if the principal is clearly insolvent, and can be proved to be so (as by his having taken advantage of an Act for the Relief of Insolvent Debtors), he need not be a party to the It will, however, be necessary, if the principal be not a party, that the fact of his insolvency should be proved; whereas, if he be a party to the suit, such proof will be unnecessary. In the case above cited from Finch, the insolvency of the principal was apparent from the fact of his having taken advantage of the Incolvent Act; but it is presumed that the insolvency of the co-security was not so capable of proof, and that it was upon that ground held necessary to have his personal representative before the Court, in order to take an account of his estate. Where the fact of the insolvency of one of the sureties was clear, and admitted by the answers, Lord Hardwicke held, that there was no necessity to bring his representatives before the Court (r). It seems, however, that the plaintiff has his election, whether he will bring the insolvent co-obligor or his representative before the Court or not (s). And in all cases coming under the 32nd Order, the plaintiff has the option to sue all the persons jointly and severally liable, if he shall

Plaintiff may elect whether or not to bring insolvent coobligor before Court; if he does, defendant enti-

.tled to costs.

(m) Newton v. Earl of Egmont, 4 Sim. 574.

(n) Hole v. Harrison, Finch, 15.

(p) 1 Cox, 276. (r) Modax v. Jackson, 3 Atk. 406. (s) Haywood v. Ovey, Mad. &

think fit. Independently of this Order, a plaintiff is allowed, in a

Gelá. 113. (o) Ibid.

⁽¹⁾ So the principal debtor must be made a party. Trescott v. Smith, 1 M'Cord, Ch. 301. (2) Story Eq. Pl. § 169. See 1 Story Eq. Jur. § 494, § 496; Long v. Dupuy, 1 Dana, 104.

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case where there are several persons who are each liable to ac- Persons jointly count for his own receipts, to file a bill against one or more of and severally them for an account of their own receipts and payments, without bringing the other parties to the suit. Thus, where a residuary where parties severally liable legatee brought his bill against one of two executors, without his to account bill co-executor, who was abroad, to have an account of his own re- may be filed ceipts and payments, the Lord Chancellor said, "The cause shall without other. go on, and if upon the account anything appear difficult, the Court will take care of it: the reason is the same here as in the case of joint factors, and the issuing out of process in this case is purely matter of form " (t).

The same rule will, it appears, be adopted, where there are Co-executors. joint factors, and one of them is out of the jurisdiction. And in Joint factors. the case of Lady Selvard v. The Executors of Harris (w), above Co-trustees. referred to, where it did not appear that the parties were out of the jurisdiction, the Court permitted the representatives of one of several trustees, who were dead, to be sued for an account of the receipts and disbursements of his testator, who alone managed the trust, without bringing the representatives of the other trustees before the Court; and now, under the 32nd Order of August, 1841, Secus, in joint it is not necessary to make all the persons committing a breach breach of trust. of trust parties to a suit instituted for redress of the wrong (z).

The rule that all the parties liable to a demand should be be- Where co-oblifore the Court was a rule of convenience, to prevent further suits gors numerfor a contribution, and not a rule of necessity, and therefore might be dispensed with, especially where the parties were many, and the delays might be multiplied and continued (y) (1); therefore. where there were a great number of obligors, and many of them were dead, and some leaving assets and others leaving none, the Court proceeded to a decree, though all of them were not be-

The general rule requiring the presence of all parties interested Exceptions to in resisting the demand, has also been dispensed with in a variety rule where of cases where the parties were numerous, and the ends of jus-ous. tice could be sufficiently answered by a sufficient number being

⁽t) Cowalad v. Cely, Prec. in Ch. 83; 1 Eq. Ca. Ab. 73, Pl. 18; 2 Eq. Ca. Ab. 165, Pl. 3, S. C.
(a) Page 293, 294. (y) Darwent v. Walton, 2 Atk. 510; Anon. 2 Eq. Ca. Ab. 166, Pl.

⁽a) Lady Cranbourne v. Crispe, z) Kellaway v. Johnson, 5 Beav. Finch, 105; 1 Eq. Ca. Ab. 70. 319; Perry v. Knott, 5 Beav. 293.

and severally liable.

In bills by tradesman against club committee.

- against joint stock companies.

Persons jointly before the Court to represent the rights of all (1). Thus, where A. agreed with B. and C. to pave the streets of a parish, and B. and C. on behalf of themselves and the rest of the parish, agreed to pay A., and the agreement was lodged in the hands of B., it was held, that A. should have his remedy against B. and C., and that they must resort to the rest of the parish (b). And so in Cullen v. The Duke of Queensberry, where a bill was filed by a tradesman against the committee of a voluntary society called "The Ladies' Club," for money expended and work done under a contract entered into by the defendant, on behalf of themselves and the other subscribers, and it was objected that all the members who had subscribed should be parties, the objection was overruled, and a decree made for the plaintiff (c).

> The same rule was acted upon by Sir Thomas Plumer, M. R., in a bill for the specific performance of an agreement for a lease, against the treasurer and directors of a Joint-Stock Company established by Act of Parliament, who had purchased the fee of the premises from the party who had entered into the agreement, although the rest of the proprietors, whose concurrence in the conveyance would be necessary, were not before the Court (d). The Master of the Rolls on that occasion came to the conclusion, that although the bill required an act to be done by parties who were absent, yet, as they were so numerous that they could not be brought before the Court, he would go as far as he could to bind their right, and made a decree declaring the plaintiffs entitled to a specific performance, and restraining the treasurer of the company from bringing any action to disturb the plaintiffs in their possion (e).

From the case of Horsley v. Bell (f), cited in the above case

(b) Meriel v. Wymondsold, Hard. 205.

(c) Cullen v. Duke of Queenberry, 1 Bro. C. C. 101 [Perkins's ed. and notes]; 1 Bro. P. C. 396, S. C. on appeal.

(d) Meux v. Maltby, 2 Swans. 277.
The following cases illustrate the mode of pleading in actions by and against Joint-Stock Companies, and will be useful in framing suits in Equity. Steward v. Dunn, 12 M. & W. 655; Davidson v. Cooper and Brassington, 11 M. & W. 778; Smith v. Goldsworthy, 4 Q. B. 430.
(c) 2 Swans. 236; and vide ibid.

287, and the cases there cited. (f) Vide Ambler, 770, and 1 Bro. C. C. 101, n., where the case is more fully reported; and see Attorneygeneral v. Brown, 1 Swan. 265.

⁽¹⁾ The like doctrine applies to cases where there are many persons defendants, belonging to voluntary associations, against whom the suit is brought, as to cases where the bill is brought by some proprietors as plaintiffs on behalf of all. Story Eq Pl. 116, et seq.; ante, 236, 287, and notes. Wood v. Dummer, 3 Mason, 315–319, 321, 322. So where the creditors of an insolvent debtor, who has assigned his prop-

of the Ladies' Club, it appears that in cases of this description the Persons jointly acting members of the committee are all liable, though some of and severally them may not have been present at all the meetings which have taken place respecting the contract. In that case the defendants were all the acting commissioners, under a Navigation Act, and the plaintiff had been employed on their behalf, and it appeared that the orders had been given at different meetings by such of the defendants as were present at these meetings; but none of the defendants were present at all the meetings, or joined in all the orders, but every one of them were present at some of the meetings, and joined in making some of the orders: and one of the questions in the cause was, whether all the acting commissioners were liable on account of all the orders, or only as to those which they had respectively signed. Upon this point the Court, was of opinion that all the acting commissioners were liable in toto. Every one who comes in afterwards approves the former acts; and if any one of the commissioners who had acted before, disapproved the subsequent acts, he might have gone to a future meeting and protested against them.

In the preceding cases the decision was made upon the ground Rule dispensed that if the plaintiff succeeded in his demands against the individ- ants numeruals sued, they would not be injured, as they had a remedy over ous; against the others for a contribution, which, under their own regulations, they might enforce, although the enforcement of it, on although their the part of the plaintiffs against so numerous a body, would be interest may be affected. nearly impossible. There are, however, other cases in which suits are permitted to proceed against a few, of many individuals of a certain class, without bringing the rest before the Court, although their interests may in some degree be affected by the decision, as in the case of bills of peace brought to establish a general legal Bills of peace. right against a great many distinct individuals: Thus, for instance, a bill may be brought by a person having a right at Law to demand service from the individuals of a large district to his mill, for the purpose of establishing that right. And the Corporation of London has been allowed to exhibit a bill for the purpose of of London to establishing their right to a duty, and to bring only a few persons to duties. before the Court, who dealt in those things on which the duty was

erty for the payment of his debts, are numerous, and some of them not within the Commonwealth, it is not necessary that they should be made parties to a bill in equity, which concerns his assets; he and his assignees only need be made parties. Stevenson v. Austin, 3 Metcalf, 474; Wakeman v. Grover, 4 Paige, 23.

and severally liable.

by lords of manors as to rights of common.

- by parsons for tithes, modus set up.

- against some of many shareholders.

Persons jointly claimed (g). And so bills are frequently entertained by lords of manors against some of the tenants, on a question of common affecting them all; and a parson may maintain a bill for tithes against a few of the occupiers within the parish, although they set up a modus to which the whole are jointly liable (A). ciple upon which the Courts have acted in those cases, has been very clearly laid down by Lord Eldon in Adair v. The New River although joint Company (i) (1).

> In that case a bill was filed by a person entitled, under the Crown, to a rent reserved out of a moiety of the profits of the New River Company, to which moiety the Crown was entitled under the original charter of that company, but had subsequently granted it to Sir John Myddleton, the original projector, reserving the rent in question. By a variety of mesne assignments, the King's moiety of the profits had become vested in a great number of persons, amounting to 100, and the bill was filed against the company and eight of those persons for an account, and it charged that there was not any tangible or corporeal property upon which the plaintiff could distrain, and that the parties were so numerous, and thus liable to so many fluctuations, that it was impossible, if the plaintiff could discover them, to bring them all before the Court, and that these impediments were not occasioned by the plaintiff or those under whom he claimed, but by the defendants, To this bill an objection was taken for want of parties, because all the persons interested in the King's share were not before the Court: but Lord Eldon said that there was no doubt that it is generally the rule that wherever a rent-charge is granted, all persons who have to litigate any title with regard to that rent charge, or with each other, as being liable to pay the whole or to contribute amongst themselves, must be brought before the Court (k); but that it was a very different consideration whether it was possible to hold that the rule should be applied to an extent destroying the very purpose for which it was established, viz., that it should prevail where it is actually impracticable to bring all the parties, or where it is attended with inconvenience almost amounting to that, as well as where it can be brought without inconvenience. It must depend upon the circumstances of each case. His Lordship said, that there were authorities

⁽g) City of London v. Perkins, 4 Bro. P. C. 158.

⁽i) 11 Ves. 429. (k) Vide 1 Eq. C. Ab. 72.

⁽h) Hardcastle v. Smithson, 3 Atk.

⁽¹⁾ See Story Eq. Pl. § 116, et seq.; ante, 320, note.

to show that where it is impracticable the rule shall not be Persons jointly pressed; and in such a case as the one before him, the King's share being split into such a number that it is impracticable to go on with a record attempting to bring all parties having interest in the subject to be charged, he should hesitate to determine, that a person having a demand upon the whole or every part of the moiety, does not enough if he brings all whom he can bring.

and severally liable.

His Lordship then goes on to say, "There is one class of cases very important upon this subject, viz. where a person having at Law a general right to demand service from the individuals of a large district to his mill for instance, may sue thus in Equity: his demand is upon every individual not to grind corn for their own subsistence except at his mill; to bring actions against any individual for subtracting that service is regarded as perfectly impracticable, therefore, a bill is filed to establish that right, and it is not necessary to bring all the individuals. Why? Not that it is inexpedient, but that it is impracticable to bring them all. The Court, therefore, has required so many that it can be justly said they will fairly and honestly try the legal right between themselves, all other persons interested, and the plaintiff; and when the legal right is so established at Law, the remedy in Equity is very simple: merely a bill stating that the right has been established in such a proceeding, and upon that ground a Court of Equity will give the plaintiff relief against the defendants in the second suit only represented by those in the first, I feel a strong inclination that a decree of the same nature may be made in this case (1) (1).

In the above case of Adair v. The New River Company, Lord Rule as to Eldon laid down as a rule, that wherever a rent-charge is granted, bringing all terre-tenants all persons whose estates are liable must be brought before the before Court This rule, however, is liable to an exception in the case dispensed with of charities, which are considered entitled to greater indulgence in matters of pleading and practice than ordinary parties (m.)in Attorney-general v. Shelly (n), it was held, that in the case of a charity it is not necessary that all the terre-tenants should be brought before the Court, because every part of the land was liable, and the charity ought not to be put to this difficulty. The

⁽l) Vide acc. Biscoe v. The Undertakers of the Land Bank, cited in 11 Ves. 367. Cuthbert v. Westwood, Vin. Ab. tit. Party, B. 255, Pl. 58.

⁽m) Attorney-general v. Jackson, (n) 1 Salk. 163.

⁽¹⁾ See Story, Eq. Pl. § 116, et seq.

cumbrancers.

Secus, unless claim homogeneous with those present.

Rule as to In- same exception to the general rule was admitted in the case of Attorney-general v. Wyburgh (o) (1).

> It is to be observed, that the rule laid down by Lord Eldon, in Adair v. The New River Company, applies only to cases where there is one general right in all the parties concerned (2); that is, where the character of all the parties, so far as the right is concerned, is homogeneous, as in the case in suits to establish a modus, or a right of suit to a mill; and that notwithstanding the inconvenience arising from numerous parties, there are some cases in which they cannot be dispensed with, as in the case of a bill filed to have the benefit of a charge on an estate, in which case all persons must be made parties who claim an interest in such estate. Thus, where estates had been conveyed to trustees, in trust for such creditors of the grantor as should execute the conveyance, and one incumbrancer, some of whose incumbrances were prior and some subsequent to the trust-deed, filed a bill praying that his rights and interests under his securities might be established, and the priorities of himself and the other incumbrancers declared; and alleging that the deed was executed by thirty creditors of the grantor, and amongst others by two individuals who were named as defendants, and charging that such creditors were too numerous to be all made parties to the suit, and that he was ignorant of the priorities and interests of such parties and of their residences, and whether they were living or dead, save as to the two who were named; a plea by some of the defendants, setting out the names and residences of the persons who had executed the deed, and alleging that they were living and necessary parties to the suit, was allowed (p) (3).

All incumbrancers under trust-deed for creditors

> With reference to this decision it may be observed, that it is the general and most universal practice of the Court, in suits for establishing charges upon estates, to make all persons entitled to incumbrances subsequent to the plaintiff's charge, parties to the Thus, in the case of a bill to foreclose a mortgage, all persons, who have encumbrances upon the estate which are posterior in point of time to the plaintiff's mortgage, must be made defen-

plaintiff 's

All incum-

claim.

brancers subsequent to

(p) Newton v. Earl Egmont, 5

⁽o) 1 P. Wms. 599; and see At-Sim. 130; and see Harrison v. Stewardson, 2 H. 530; ante, p. 285-6, and Holland v. Baker, 3 H. 68. torney-general v. Jackson, 11 Ves. 365.

⁽¹⁾ Story Eq. Pl. § 93.

⁽²⁾ See Story Eq. Pl. § 120§ 130, et seq.
(3) Story Eq. Pl. § 130, et seq.

cumbrancers.

in suits to

dants (1); for although, if there are many incumbrancers, some Rule as to Inof whom are not made parties to a bill of foreclosure, the plaintiff may, notwithstanding, foreclose such of the defendants as he has brought before the Court (q); yet such decree will not bind foreclose must be defendants. the other incumbrancers who are not parties, even though the mortgagee at the time of foreclosure had no notice of the existance of such incumbrancers (r) (2). This rule may at first appear inconsistent with the usual principles of a Court of Equity, but the justice of it is very clearly shown in the report of the Lord Keeper Finch's judgment in Sherman v. Cox (s). His Lordship says, "Although there be a great mischief on one hand that a mortgagee, after a decree against the mortgagor to foreclose him of his equity of redemption, shall never know when to be at rest, for if there be any other incumbrances, he is still liable to an account, yet the inconvenience is far greater on the other side: for if a mortgagee that is a stranger to this decree should be concluded, he would be absolutely without remedy, and lose his whole money, when, perhaps, a decree may be huddled up purposely to cheat him, and in the mean time (he being paid his interest) may be fulled asleep and think nothing of it; whereas, on the other hand, there is no prejudice but being liable to the trouble of an account, and if so be that were stated bona fide between the mortgagor and mortgagee in the suit wherein the decree was obtained, that shall be no more ravelled into, but for so long shall stand untouched" (t).

Upon the same ground it was that Lord Alvanley, M. R., in the Bishop of Winchester v. Beavor (u), ordered a bill of foreclosure to stand over for the purpose of making a judgment creditor a party. From the marginal note to that case, a doubt

Vern. 518.

(r) Lomax v. rines, z verm. 105; Godfrey v. Chadwell, ib. 601; 1 Eq. Ca. Ab. 318, Pl. 7, S. C.; Morret v. Westerne, 2 Verm. 663; 1 Eq. Ca. Ab. 164, Pl. 7, S. C. (e) 2 Freem. 14. (f) What is here said by the Lord

(q) Draper v. Lord Clarendon, 2 Morret v. Westerne, supra. It seems to be in cansequence of the rule (r) Lomax v. Hide, 2 Vern. 185; above laid down, that the practice offrey v. Chadwell, ib. 601; 1 Eq. prevails of introducing an interrogatory into a bill of foreclosure, inquiring whether there are any and what incumbrances affecting the estate be-sides that of the plaintiff, in order that, if the answer states any, the owners of such incumbrances be made parties. [Story Eq. Pl. § 193, note.]

(u) 3 Ves. 313.

Chancellor on the subject of the account, as well as the case of Needler v. Deeble, 1 Cha. Ca. 299, appears to be at variance with the decision in

⁽¹⁾ But see Smith v. Chapman, 4 Conn. 344.
(2) 4 Kent, (5th ed.) 184, 185; Haines v. Beach, 3 John. Ch. 459; Lyon v. Sandford, 5 Conn. 544; Renwick v. Macomb, 1 Hopk. 277; Story Eq. Pl. § 193, and notes; ante, 244, note.

cumbrancers.

Rule as to In- appears to arise as to whether the Master of the Rolls intended to adopt the general rule, that all incumbrancers must be parties to a bill of foreclosure; but the decision rests upon the rule of practice, which has been stated, and it cannot after that decision be doubted that all incumbrancers whose liens appear upon the answer, must be made parties, and if that answer be a sufficient one and true, it must, according to the practice in drawing bills before stated (x) appear upon the answer who such incumbrancers are. At all events, it is evident, from the cases of Lomax v. Hide, Godfrey v. Chadwell, Morrett v. Westerne, just referred to, that if a mortgagee wishes to obtain an undisputed right to an estate by foreclosure, he must make all incumbrancers upon the estate, of whose liens he has notice, (whether appearing upon the answer or not,) parties to his suit (y).

Extends to all cases where sale or charge subsequent to plaintiff's claim.

Rule in cases of sub-contracts for sale.

The rule which requires all incumbrancers upon the equity of redemption to be brought before the Court in cases of foreclosure, extends to cases in which the subject of the litigation has been sold, or charged subsequently to the date of the plaintiff's claim, whether such sale or charge has been by legal instrument, or only by agreement, or whether it extends to the whole or only partial interests. Thus, where a bill was filed by a lessee to compel a landlord to give his license to the assignment of a lease to a purchaser, on the ground that he had by certain acts waived the right to withhold it, which had been reserved to him by the original lease, the purchaser was held to be a necessary party (z). And so if a man contracts with another for the purchase of an estate, and afterwards, before conveyance, enters into a covenant with a third person that the vendor shall convey the estate to such third person. the vendor, if he have notice of the subsequent contract, cannot with safety convey the estate to the vendee without the concurrence of the third person, who in that case will be a necessary party to a bill by the purchaser against the vendor for a specific performance; but if A. contracts with B. to convey to him an estate, and B. enters into a sub-contract with C., that he, B, will convey to him the same estate, then if B. files a bill against A., C. will not be a necessary party, because A. is in that case in no manner affected by the sub-contract, which his conveyance to B. would rather protect than injure (a). And where a bill was filed by creditors to set aside a purchase on the ground of fraud, and it appeared that the purchaser had, since his purchase, executed a

⁽z) See note (t) last page. (y) Rolleston v. Morton, 1 Dr. & Russ. 349. W. 171. (z) Maule v. Duke of Beaufort, 1 - v. Walford, 4 Russ. 37%. (a) -

mortgage of the estate, the mortgagee was considered a necessary Rule as to Inparty (b).

cumbrancers.

The rule which requires all subsequent incumbrancers to be parties, extends only to cases in which the subsequent charges or incumbrances are specific; and we have before seen, that in most cases where estates have been conveyed to trustees to pay debts or legacies, the trustees may sustain suits respecting the trust property, without those claiming under the trust being parties to it, although in a bill to foreclose them the cestui que trusts must all be before the Court (c). It is also unnecessary that persons hav- Persons having prior mortgages or incumbrances should be parties, because ing prior charges unnecessathey will have the same lien upon the estate after a decree as they ry. had before (d); for this reason it has been held, that in a bill for a partition, a mortgagee upon the whole estate is not a necessary party, though a mortgagee of one of the undivided portions would be (e). And so where a bill was brought by a mortgagor against a mortgagee, praying a sale of the mortgaged estate, persons who had annuities prior to the mortgage were held unnecessary parties, and notwithstanding they appeared at the hearing and consented to a sale, Lord Kenyon, M. R., dismissed the bill as to them with costs, and said that the estate must be sold subject to their annuities (f). It must have been upon the same principle, that the case of Lord Hollis, cited in 3 Cha. Rep. 86, wherein it was held that a third mortgagee buying in the first, need not make a second mortgagee a party, was decided, otherwise, it is not easy to reconcile that case with the other principles which have been laid down. It cannot be supposed that it was meant to be decided that a third mortgagee buying in the first mortgage, could by that process acquire the right to foreclose the second, without bringing him before the Court, and giving him an opportunity to redeem.

It is right to remark here, that in all cases where a mortgagee Mortgagee is made a party to a suit by the mortgagor or those claiming under when a party him, he is entitled to be redeemed (g); and that therefore, unless be redeemed. a second mortgagee or other incumbrancer is prepared to redeem him, he will be an improper party to a suit by such mortgagee or incumbrancer, where the object is merely to forclose the equity of redemption (1).

is entitled to

⁽b) Copis v. Middleton, 2 Mad. 410.

⁽c) Lord Red. 175.

⁽d) Rose v. Page, 2 Sim. 471.

⁽c) Swan v. Swan, 8 Pri. 518.

⁽f) Delabere v. Norwood, 3 Swan. 144, n.

⁽g) Drew v. O'Hara, 2 Ball. & Beat. 562, n.; Cholmley v. Countess of Oxford, 2 Atk. 267.

⁽¹⁾ See Story Eq. Pl. § 186, et seq.

Rule as to incumbrancers.

Second mortgagee may redeem first quent incumbrancer.

It is also to be observed, that a second incumbrancer may file a bill to redeem the first, without making a subsequent incumbrancer a party; and that if he brings him before the Court for the mere purpose of having his incumbrance postponed, and not without subset to foreclose him, the bill will be dismissed against him with costs (h) (1).

> But a bill for redemption cannot be sustained by a party having a partial interest in the equity of redemption, in the absence of the other parties interested in it (i) (2).

Becoming such after bill filed.

With respect to incumbrancers or purchasers becoming such after a bill has been filed they will be bound by the decree, and need not be made parties to the suit, whether the plaintiff have notice of them or not, for an alienation pending a suit is void, or rather void-If, therefore, after a bill filed by the first mortgagee to foreclose, the mortgagor confesses a judgment, executes a second mortgage, or assigns the equity of redemption, the plaintiff need not make the incumbrancer, mortgagee, or assignee parties, for they will be bound by the suit; and where a purchaser took an exception to a title, because two mortgagees, who became such after the bill was filed, were no parties to the foreclosure, the exception was overruled with costs (1); and it is immaterial in the application of this principle, whether the party making the assignment perdente lite, occupies the position of plaintiff or defendant, provided his interest is equitable (m) (3). But in cases where a change in the ownership of the legal estate takes place pending the suit, by alienation or otherwise, the new owner must be brought before the Court in some shape or other, in order that he may execute a conveyance of the legal estate (n) (4).

Purchaser pendente lite.

If a person, pendente lite, takes an assignment of the interest of one of the parties to the suit, he may if he pleases make himself a party to the suit by supplemental bill, but he cannot by petition pray to be admitted to take a part as a party defendant; all that the

(h) Shepherd v. Gwinnet, 3 Swan. 151, n.
(i) Henley v. Stone, 3 Beav. 355.

(1) Bishop Winchester v. Paine, 11 Ves. 199. (m) Eades v. Harris, 1 Y. & C. 230.

(n) Daly v. Kelly, 4 Dow, 435; Bishop of Winchester v. Paine, se-

(k) Walker v. Smalwood, Amb. 676; Gaskill v. Durdin, 2 Ba. & Be. 167; Moore v. M'Namara, 1 Ba. & Be. 309; Gentle v. Ward, 2 Atk. 175; Metcalfe v. Pulvertoft, 2 V. &

pra.

⁽¹⁾ See Story Eq. Pl. § 193 and notes. (2) Story Eq. Pl. § 185.

⁽³⁾ Story Eq. Jur. § 156; ante, 248, and note and cases cited to this point of assignments pendente lits; 2 Story Eq. Jur. § 908.

(4) Story Eq. Pl § 351.

Court will do is to make an order that the assignor shall not take the property out of Court without notice (o) (1).

Persons against whom Defendant has a remedy over.

We now some to the consideration of those cases in which it is Persons necessary to make persons defendants to a suit, not because their against whom rights may be directly affected by the decree, if obtained, but be-defendant has cause, in the event of the plaintiff succeeding in his object against must be parthe principal defendant, that defendant will thereby acquire a right ties. to call upon him either to reimburse him the whole or part of his demand, or to do some act towards reinstating him in the situation he would have been in but for the success of the plaintiff's claim. In such cases the Court, in order to avoid a multiplicity of suits, requires that the parties so consequentially liable to be affected by the decree, shall be before the Court in the first instance, in order that their liabilities may be adjudicated upon and settled by one proceeding (2). Thus, where a defendant in his answer insisted that he was entitled to be reimbursed by A. what he might be decreed to pay to the plaintiff, and therefore that A. was a necessary party, the Court, at the hearing, directed the cause to stand over, with liberty to the plaintiff to amend by making A. a defendant (p). And so where an heir at law brought a bill against a widow to Personal repcompel her to abide by her election, and to take a legacy in lieu of a suit by heir dower, it was held that the personal representative was a necessary to compel widparty, because in the event of the plaintiff's succeeding she was en- ow to elect. titled to satisfaction for her legacy out of her personal estate; and the plaintiff had leave to amend, by making the executor a party (q).

a remedy over

.Upon the same principle it is, that in suits by specialty creditors, In suits by for satisfaction of their demands out of the real estate of a person specialty deceased, it is required that the personal as well as the real representative should be brought before the Court (r), because the personal estate, being the primary fund for payment of debts, ought to go in ease of the land (s), and the heir has a right to insist that it shall be exhausted for that purpose before the realty is charged; so that if a decree were to be made in the first instance against the

⁽o) Foster v. Deacon, Mad. & Geld. 59.

⁽p) Greenwood v. Atkinson, 5 Sim. 419; see also the case of Green v. Poole, 5 Bro. P. C. 504.

⁽q) Lesquire v. Lesquire, Rep. t. Finch, 134. (r) 3 Atk. 406.

⁽s) Galton v. Hancock, 2 Atk. 434.

⁽¹⁾ Story Eq. Pl. § 342 and notes, § 348; Sedgwick v. Cleveland, 7 Paige, 290; Deas v. Thorne, 3 John, 544.

⁽²⁾ Story Eq. Pl. § 173 et seq., § 180; Wiser v. Blackley, 1 John. Ch. 437.

Persons against whom

heir, he would be entitled to file a bill against the personal repre-Defendant has sentative to reimburse himself. The Court, therefore, in order to a remedy over. avoid multiplicity of suits, requires both the executor and heir to be before them, in order that it may, in the first instance, do complete justice, by decreeing the executor to pay the debt, as far as the personal assets will extend, the rest to be made good by the beit out of the real assets (t) (1). Upon this principle it was, that where a man covenanted for himself and his heirs that a jointure house should remain to the uses in a settlement, and the jointress brought a bill against the heir to compel him to rebuild and finish the jointure house, and to make satisfaction for the damage which she has sustained for want of the use thereof, Lord Talbot allowed a demurrer, on the ground that the executor ought to be a party, because the Court would not in the first instance decree against the heir to perform his covenant, and then put the heir upon another bill against the personal representative to reimburse himself out of the personal assets (u).

Where representation contested in **Ecclesiastical** Court.

A bill of discovery of real assets may, however, be brought against the heir, in order to preserve a debt, without making the administrator a party, where it is suggested that the representation is contested in the Ecclesiastical Court (z) (2); and where the heir of an obligor would not administer himself, and had opposed the plaintiff, who was a principal creditor, in taking out administration, a demurrer by him, because the administrator was not a party, was overruled (v) (3).

In foreclosure against heir of mortgagor.

Where the nature of the relief prayed is such that the heir at law has no remedy over against the personal estate, the personal representative is an unnecessary party; thus, in the case of a bill filed by a mortgagee against the heir of a mortgagor to foreclose, the executor of the mortgagor is an unnecessary party, because in such a case the mortgagee has a right to the land pledged, and is not in any ways bound to intermeddle with the personal estate, or to run into an account thereof; and if the heir would have the benefit of any payment made by the mortgagor or his executor, he must prove it (z) (4). And it makes no difference if the mort-

(t) Knight v. Knight, 3 P. Wms.

(y) D'Aranda v. Whittingham, Mos.

(u) Knight v. Knight, 3 P. Wms. 333; and see Bressenden v. Decreets, 2 Ch. Ca. 197.

(z) Duncombe v. Hansley, 3 P. Wms. 333, notia; Fell v. Brown, 2 Bro. C. C. 279.

(x) Plunket v. Penson, 2 Atk. 51.

⁽¹⁾ Story Eq. Pl. § 173 et seq. (2) Story Eq. Pl. § 91. (3) Story Eq. Pl. § 175, § 186, § 196. See 4 Kent, (5th ed.) 185, 186. (4) Story Eq. Pl. § 196, 200.

gage be by demise for a term of years, provided the mortgagor was seized in fee; in such case the executor is an unnecessary party, Defendant has and if made one, the bill against him will be dismissed with a remedy over. costs (a) (1). And where a term of 1000 years had been granted, When heir but conditioned to sink and be extinguished upon payment of an seeks surrenannuity for forty-two years, and at the expiration of the time a bill der of term. was brought by the heir of the grantor for a surrender of the residue of the term, it was held that the personal representative of the grantor need not be a party (b).

against whom

Where however the mortgagee mixes together his character of mortgagee and general creditor, and seeks relief beyond that to which his position of mortgagee by itself would strictly entitle him, then it would appear that the personal representative of the mortgagor must be a party to the bill, and there must be an account of the personal estate. It may here be observed, that it does not seem to be definitely settled whether, when the mortgaged estate is insufficient to satisfy the amount charged upon it, and the personalty is also inadequate to pay all the debts, the mortgagee is entitled to prove against the personalty for the whole of his debt, or only for the residue, after deducting what he has received from When sale his security (c) (2). In suits of this description, the Court will of foreclosure.

(a) Bradshaw v. Outram, 13 Ves. 234. If the mortgage was of a chattel interest, of course the executor, and not the heir, would be the proper party; and if freehold and leasehold estates are both comprised in the same mortgage, both the heir and ex-ecutor will be necessary parties to a bill of foreclosure. Robins v. Hodgson, Rolls, 15 Feb. 1794.

(b) Bampfield v. Vaughan, Rep. t.

(e) Bampheld v. Vanghan, Rep. t. Finch, 104.

(c) Mason v. Bogg, 2 M. & C. 443; Greenwood v. Taylor, 1 R. & M. 185; Greenwood v. Firth, 2 Hare, 241, n.; Tipping v. Power, 1 Hare, 405; Marshall v. Macartney, 3 Dr. & W. 232.

The value of the land may be ascertained either by a sale, or by estimate, and proof of the value of the property mortgaged. See 4 Kent (5th ed.) 182, 183; Tooke v. Hartley, 2 Bro. C. C. (Ferkins's ed.) 126, 127 and notes; Hodge v. Holmes, 10 Pick. 380, 381; Amory v. Fairbanks, 3 Mass. 562; Newall v. Wright, 3 Mass. 150; Briggs v. Richmond, 10 Pick. 396; West v. Chamberlain, 8 Pick. 336; Hart v. Ten Eyck, 2 John. Ch. 62; Wiley v. Angel, 1 Clarke, 217; Suffern v. Johnson, 1 Paige, 450; Downing v. Palmateer, 1 Menroe, 66; M'Gee v. Davie, 4 J. J. Marsh. 70; Bank of Ogdensburg v. Angeld 5 Paige, 38 Arnold, 5 Paige, 38.

⁽¹⁾ A mortgagee, who has entered for condition broken, may have an action on the bond, and he will recover the difference between the value of tion on the bond, and he will recover the difference between the value of the bond and the amount of the principal and interest on the bond. Amory v. Fairbanks, 3 Mass. 562; Newall v. Wright, 3 Mass. 150; 4 Kent, (5th ed.) 182, 183; Tooke v. Hartley, 2 Bro. C. C. (Perkins's ed.) 126, 127 and notes; Perry v. Barker, 8 Sumner's Vesey, 527, Perkins's note (a) and cases cited; Hatch v. White, 2 Gallis. 152; Globe Ins. Co. v. Lansing, 5 Cowen, 380; Omaly v. Owen, 3 Mason, 474; Lansing v. Goelet, 9 Cowen, 346; Lowell v. Leland, 3 Vermont, 581; Callum v. Emanuel, 1 Als. N. S. 23.

The value of the land was be acceptained either by a rate or by actimate.

Persons against whom

decree not a foreclosure but a sale of the estate (d) (1), to which Defendant has a mortgagee is not ordinarily entitled upon a bill filed by him witha remedy over, out reference to his rights as a general creditor (e). Where the bill is filed to redeem a mortgage against the heir of a mortgage. the personal representative must also, as the party entitled to the money, be made a party to the suit (2), because, although the mortgagee upon paying the principal money and interest has a right to a reconveyance from the heir, yet the heir is not entitled to receive the money; and, if it were paid to him, the personal representative would have a right to sue him for it.

Heir at law of purchaser in suits for specific performance.

Where vendee dies pendents lite:

Where a man contracts for the purchase of an estate, and dies intestate as to the estate contracted for before the completion of the contract, the vendor has a right to file a bill against his personal representative for payment of the purchase-money, but if he does, he must make the heir at law a party, because the heir is the person entitled to the estate. And for the same reason where the vendee, after the cause was at issue, died, having devised the estate which was the subject of the suit to infant children, and the plaintiff revived against the personal representatives only; it was held that the infant devisees were necessary parties, and the suit was ordered to stand over, in order that they might be brought before the Court (f) (3).

Personal representative of purchaser.

Upon the same principle, if a vendor were to file a bill against the heir, the heir would have a right to insist upon the personal representative being brought before the Court, because the purchase-money is in the first instance payable out of the personal es-

(d) Daniell v. Skipwith, 2 Bro. C. C. 155; see also Christopher v. Sparke, 2 J. & W. 229. (e) The cases in which a mortga-

gee may have a sale instead of a foreclosure, are—1, where the estate is deficient to pay the incumbrance; 2, where the mortgage is of a dry reversion; 3, where the mortgagee dies and the equity of redemption de-

scends upon an infant; 4, where the mortgage is of an advowson; 5, where the mortgagor becomes a bankrupt; and 6, where a mortgage is of an estate in Ireland. Vide 2 Powell on Mortgages, by Coventry, 1016, n. T. [2 Story Eq. Jur. § 1026].

(f) Townsend v. Champernowne, 9 Pri. 130.

⁽¹⁾ See 2 Story Eq Jur. § 1025, 1026, 1027; 4 Kent, (5th ed.) 146, 147, 182, 183. It is not a matter of course, on a bill for foreclosure and sale, to order the whole of the mortgaged premises to be sold. Under certain circumstances no more will be sold than enough to pay the debt and costs. Delabigarre v. Bush, 2 John. 490; Suffern v. Johnson, 1 Paige, 450; Brinkerhoff v. Thalhimer, 2 John, Ch. 486.

The mortgaged premises may be sold either together or in parcels, as will be best calculated to produce the highest sum. Suffern v. Johnson, 1 Paige, 450; Campbell v. Macomb, 4 John. Ch. 534.
(2) Dexter v. Arnold, 1 Sumner, 108.

⁽³⁾ See Cox v. Sprode, 2 Bibb, 276; Fisher v. Kay, 2 Bibb, 434; Huston v. M'Clarty, 3 Litt. 274; Morgan v. Morgan, 2 Wheat. 90; Story Eq. Pl. § 160, § 177; Champion v. Brown, 6 John. Ch. 402.

tate (1). But where a bill stated that an estate, purchased in the defendant's name, was so purchased in trust for the plaintiff's an- Defendant has cestors who paid the purchase-money, and prayed a reconveyance, a remedy over. a demurrer on the ground that the executor of the ancestor was not a party, was overruled; because the purchase money having been paid, it was quite clear that no decree could have been made against the personal representative (g).

Upon the same principle fermerly the Courts in the case of sureties, and of joint obligors in a bond, compelled all who were bound or their representatives to be before the Court, in order to avoid the multiplicity of suits which would be occasioned if one or more were to be sued without the others, and left to seek contribution from their co-sureties, or co-obligors in other proceedings; but we have seen that in this respect the 32nd Order of August, 1841, has altered the practice (h).

## SECTION III.

## Of Objections for want of Parties.

HAVING endeavored in the preceding sections of this Chapter to How taken. point out the parties who ought to be brought before the Court by the plaintiff, in order that complete justice may be done in the suit, the next step is to show in what manner an objection, arising from the omission of any of these parties in a bill, is to be taken advantage of by the defendant, and how the defect arising from such omission is to be obviated or remedied by the plaintiff.

And here it is necessary to remark, in the first instance, that no Who are conpersons are considered as parties to a suit, except the plaintiffs and to a suit. persons against whom the bill prays either the writ of subpœna, or that upon being served with a copy of the bill, they may be bound

(g) Astley v. Fountain, Rep. t. (A) See ante, page 316. Finch, 4.

⁽¹⁾ See Story Eq. Pl. § 177. Upon a bill for the recision of a contract for land, for defect of title in the vendor, the heirs of the vendee must be made parties. Huston v. Noble, 4 J. J. Marsh. 136. See Harding v. Handy, 11 Wheat. 104.

By Demurrer. by the proceedings in the cause (1); but the mere naming a person as a defendant, does not make him a party (i), (2).

> A defect of parties in a suit may be taken advantage of either by demurrer, plea, or answer (3).

Demurrer for

Whenever the deficiency of parties appears on the face of a bill, want of parties. the want of proper parties is a cause of demurrer (4). There appears to be some doubt whether a demurrer of this nature can be partial, and whether it must not extend to the whole bill. the case of The East India Company v. Coles (k), Lord Loughborough was inclined to think, that there could not be a partial demurrer for want of parties; but upon Mr. Mitford mentioning some cases (1), wherein such partial demurrers had been allowed, the case was ordered to stand over to the next day of demurrers (5); in the mean time, however, the plaintiff's counsel, thinking it better for his client, amended the bill.

Obviated by showing cause for omission.

It is to be observed, that if a sufficient reason for not bringing a necessary party before the Court is suggested by the bill, as, if a personal representative is required, and the representation is charged to be in litigation in the Ecclesiastical Court, or if the bill seeks a discovery of the persons interested in the matter in question, for the purpose of making them parties, and charges that

- (i) Windsor v. Windsor, 2 Dick.
  - (k) 3 Swan, 142, n.

(1) Astley v. Fountain, Finch, 4; Attwood v. Hawkins, Finch, 113; Bressenden v. Decreets, 2 Cha. Ca. 197.

(1) Story Eq. Pl. § 44, 1 Smith, Ch. Pr. (2nd Am. ed.) 86; Walker v. Hallett, 1 Ala. (N. S.) 379; Lucas v. Bank of Darien, 2 Stewart, 280; Lyle v. Bradford, 7 Monroe, 113; Huston v. M'Clarty, 3 Litt. 274.

In New York parties may be treated as defendants, by a clear statement in the bill to that effect, without praying the subpana. The reason given is

that in that state, the subpana is issued of course, and that a formal prayer is unnecessary to entitle the plaintiff to process. Brasher v. Cortlandt, 2 John. Ch. 245; Elmendorf v. Delancy, 1 Hopk. 555; Verplanck v. Mercant. Ins. Co. 2 Paige, 438.

(2) To make him such, process must be issued and served upon him. Bond v. Hendricks, 1 A. K. Marsh. 594.

(3) See Clark v. Long, 4 Rand. 451; Story Eq. Pl. 236.

(4) Mitchell v. Lenox, 2 Paige, 281; Robinson v. Smith, 3 Ib. 222; Crane v. Deming, 7 Conn. 387; Story Eq. Pl. § 541.

Courts will take notice of the omission of the proper defendants in the bill, though no demurrer be interposed, when it is manifest that the decree will have the effect of depriving them of their legal rights. Herrington v. Hubbard 1 Scam 569; Clark v. Long 4 Rand 451

bard, 1 Scam. 569; Clark v. Long, 4 Rand. 451.

(5) It is good ground of demurrer to the whole bill, that a person, who has no interest in the controversy, and has no equity as against the defendant, is improperly found as a party plaintiff. Clarkson v. De Peyster, 3 Paige,

The proper course, where there is a want of necessary parties, is to order the cause to stand over, to enable the plaintiff to bring the necessary parties before the Court; or to dismiss the bill without prejudice, so that his

they are unknown to the plaintiff, a demurrer for want of the By Demurrer. necessary parties will not hold (m) (1).

Upon the same principle, where it was stated in a bill that the defendant, who was the next of kin of an intestate, had refused to take out letters of administration, and that the plaintiff had applied to the Prerogative Court for administration, but having been opposed by the defendant, was denied administration, because he could not prove that the intestate had left bona notabilia; and that he had afterwards applied to the Consistory Court of Bath and Wells, where he likewise failed, because he could not prove that the intestate had died in the diocese; and that the defendant had refused to discover where the intestate had died; a demurrer for want of proper parties, because the personal representative of the intestate was not before the Court, was overruled (n).

It is said that a demurrer for want of parties must show who are Demurrer the proper parties; not indeed by name, for that might be impossi- must show ble (o); but in such a manner as to point out to the plaintiff the objection to his bill, so as to enable him to amend by adding the necessary persons (p) (2). Some doubt has been thrown upon the correctness of this rule, in consequence of an observation by Lord Eldon in Pyle v. Price (q). His Lordship is there reported to have said, "that beside the objection which had been mentioned at the bar, to the rule which required the party to be stated, it might appear that the plaintiff knows the party," and then to have observed, "perhaps there is not a general rule either way." It is submitted, however, that this observation of Lord Eldon does not at all shake the rule which has been laid down, as to the necessity

⁽m) Lord Red. 180.
(n) D'Aranda v. Whittingham,
Mos. 84.

(p) Lord Red. 181; Attorney-general v. Jackson, 11 Ves. 369.
(q) 6 Ves. 781; and see Attorney-

⁽o) Tourton v. Flower, 3 P. Wms. 369.

general v. Corporation of Poole, 4 M. & C. 32.

right to bring a new suit, making all proper persons parties thereto, will not be barred by the decree. Miller v. M'Can, 7 Paige, 452.

Where the proper parties are not made defendants, and the bill is dismissed, it should be without prejudice. Huston v. M'Clarty, 3 Litt. 274; Steele v. Lewis, 1 Monroe, 49; Royse v. Tarrant, 6 J. J. Marsh. 567; post 341, note; Mims v. Mims, 3 J. J. Marsh. 105, Lewis v. Forbes, 4 ib. 189; Caldwell v. Hawkins, 1 Litt. 212; Hackwith v. Damron, 1 Monroe, 239; Rowland v. Garman, 1 J. J. Marsh. 77; Van Epps v. Van Deusen, 4 Paige, 64; Stall v. Baskerville, 6 Munf. 20; Payne v. Richardson, 7 J. J. Marsh. 240; Griffing v. Huddleston, 6 ib. 443; Churchill v. Trippett, ib. 517; Beauchamp v. Handley, 1 B. Monroe, 135, 139.

(1) See Gilman v. Cairnes, 1 Breese. 124.

(2) Story Eq. Pl. § 543 and note, in which is a form of demurrer for want of necessary parties.

of necessary parties.

By Demurrer. of pointing out who the necessary party is, but merely refers to the observation made at the bar, that there was no rule requiring a demurrer to state the parties, that is, by name, as it might be out of the power of the defendant to do so; and that it does not refer to the necessity of calling the plaintiff's attention to the description or character of the party required, in order to enable him to amend his bill, without putting him to the expense of bringing his demurrer on for argument, which he might otherwise be obliged to do, in order to ascertain who the party required by the defendant

Amendment after demurrer.

Where a demurrer for want of parties is allowed, the cause is not considered so much out of Court but that the plaintiff may afterwards have leave to amend, by bringing the necessary parties before the Court (r) (1). And where the demurrer has been ore tenus, such leave will be granted to him without his paying the costs of the demurrer; though if he seeks, under such circumstances, to amend more extensively, than by merely adding parties, he must pay the defendant the costs of the demurrer (s).

Upon the allowance, however, of a demurrer for want of parties, the plaintiff is not entitled as of course to an order for leave to amend; where it is said that a bill is never dismissed for want of parties (2), nothing more is meant than that a plaintiff, who would be entitled to relief if proper parties were before the Court, shall not have his bill dismissed for want of them, but shall have an opportunity afforded of bringing them before the Court; but if at the hearing the Court sees that the plaintiff can have no relief under any circumstances, it is not bound to let the cause stand over that the plaintiff may add parties to such a record (t) (3).

If the defect of parties is not apparent upon the face of the bill,

(r) Bressenden v. Decreets, ubi (s) Newton v. Lord Egmont, 4 supra; vide etiam, Lloyd v. Loaring, Sim. 585. 6 Ves. 773. (t) Tyler v. Bell, 2 M. & C. 110.

⁽¹⁾ Story Eq. Pl. § 541 and notes; McElwain v. Willis, 3 Paige, 595; Lindley v. Cravens, 2 Blackf. 426.

See Harrison v. Rowan, 4 Wash. C. C. 202; Arundel v. Blackwell, Dev. Eq. 354.

⁽²⁾ But see ante, 334, note, this point, and Nash v. Smith, 6 Conn. 422. The bill is sometimes dismissed for want of proper parties, but without prejudice to the plaintiff's right to bring a new suit. Miller v. M'Crea, 7 Paige, 452; Huston v. M'Clarty, 3 Litt. 274; Steele v. Lewis, 1 Monroe, 49; Royse v. Terrant, 6 J. J. Marsh. 567; Story Eq. Pl. § 541; post, 341, 342, note.

⁽³⁾ See Story Eq. Pl. § 541 and note; Russell v. Clarke, 7 Cranch, 69, 99.

the defect may be brought before the Court by plea, which must aver the matter necessary to show it (u) (1).

By Plea.

A plea for want of proper parties is a plea in bar, and goes to Pleas of want the whole bill, as well to the discovery as to the relief, where re- of parties. lief is prayed (x), though the want of parties is no objection to a bill for discovery merely (y).

Where a sufficient reason to execuse the defect is suggested by Not allowed if the bill (2), where a personal representative is a necessary party, sufficient exand the bill states that the representation is in contest in the Ecclesiastical Court (z); or where the party is resident out of the jurisdiction of the Court, and the bill charges that fact (a); or where the bill seeks a discovery of the necessary parties (b), a plea for want of parties will not, any more than a demurrer for the same cause, be allowed, unless the defendant controverts the excuse Must contromade by the bill, by pleading matter to show it false (c). Thus, vert excuse made by bill. in the first instance above put, if before the filing of the bill the contest in the Ecclesiastical Court had been determined, and administration granted, and the defendant had showed this by his plea, the objection for want of parties would not in strictness have been good.

Upon arguing a plea of this kind, the Court, instead of allowing Leave to it, generally gives the plaintiff leave to amend the bill, upon pay- amend after ment of costs; a liberty which he may also obtain after allowance of the plea, according to the common course of the Court, for the suit is not determined by the allowance of a plea (d) (3).

The defendant may also by his answer object that the bill is de-Objection by fective for want of parties, in which case the plaintiff is now, un-answer. der the 39th Order, of August, 1841, within fourteen days after answer filed, at liberty to set down the cause for argument upon that objection alone. If he does so, the objection is argued, the plaintiff commencing. After the argument, the Court makes an order, declaring its opinion upon the record as it then stands; but

⁽w) Lord Red. 280; 1 Vern. 110; 2 Atk. 51.

⁽x) Plunkett v. Penson, 2 Atk. 51; Hamm v. Stevens, 1 Vern. 110.
(y) Sangosa v. East 1ndia Compa-

ny, 2 Eq. Ca. Ab. 170, Pl. 28

⁽z) Plunkett v. Penson, 2 Atk. 51.

⁽a) Cowslad v. Cely, Prec. Ch. 83; Darwent v. Walton, 2 Atk. 510.

⁽b) Bowyer v. Covert, 1 Vern. 95. (c) Lord Red. 281.

⁽d) Ibid.

⁽¹⁾ Robinson v. Smith, 3 Paige, 222; Story Eq. Pl. § 236.
(2) Gilman v. Cairnes, Breese, 124.
(3) Harrison v. Rowan, 4 Wash. C. C. 202; Story Eq. Pl. § 885, 886, and note in which is inserted the rules of the Supreme Court of the United States on the subject of amendments, adopted January Term, 1842. See also 17 Peters, App. 66; 1 Howard Introd. 50, 51.

At the hearing, the objection cannot finally be disposed of until the hearing, because it is impossible at the beginning of a cause to declare who will be necessary parties at the end (e). If, on the other hand, the plaintiff does not set down the cause upon the objection for want of parties, he subjects himself to the penalty, that he will not at the hearing be entitled, as of course, to an order to amend by adding parties: he would still, however, be at liberty to make out a special case for the exercise of the discretion of the Court, in his favor, and the Court would then have to decide whether his bill should be dismissed for want of parties, or retained with liberty either to amend (f), or to file a supplemental bill for the purpose of bringing the proper parties before the Court. It is to be observed, that the order only allows fourteen days after answer for the plaintiff to set down his cause upon the objection for want of parties, but the V. C. of England has decided, that this only means that the cause may be set down within this period as a matter of course, but that afterwards the leave of the Court may be obtained (g). Previously to the Orders of 1841, when an objection for want of parties was taken at the hearing, the rule with respect to costs was, that if the objection for want of parties had been taken by the defendant's answer; or if it arose upon a statement of the bill, then the liberty to amend or file a supplemental bill, was not given to the plaintiff, except upon the terms of his paying to the defendant the costs of the day; but if the objection depended upon a fact within the defendant's knowledge, and was not raised by his answer, the order would be made without payment of costs of the day (h) (1).

Costs.

The recent Orders do not appear directly to have affected this rule concerning costs in such cases, but the 40th Order, of August, 1841, provides, that if the defendant shall at the hearing of a cause object that a suit is defective for want of parties, not having by plea or answer taken the objection, and therein specified by name or description the parties to whom the objection applies, the Court,

(c) Bradstock v. Whatley, 6 Beav. 451.

Attorney-general v. Hill, 3 M. & C. 247; Mason v. Franklin, Y. & C. 242; Perkins v. Bradley, 1 H. 219, where notice of disclaimer had been given to the objecting defendant; as to the amount of costs, see 35th Ord.

⁽f) 39th Order, Aug. 1841, & S.C. (g) Cockburn v. Thompson, 13 Sim. 188.

⁽k) Mitchell v. Bailey, 3 Mad. 61; Furze v. Sharwood, 5 M. & C. 96;

⁽¹⁾ See Colt v. Lasnier, 3 Cowen, 320; Story Eq. Pl. § 541. When the objection is taken by demurrer, and sustained, the defendant will be entitled to his costs; but when it is taken at the hearing only, the defendant is usually not entitled to his costs. Story Eq. Pl. 541.

if it shall think fit, may make a decree saving the rights of the ab. At the hearing. sent parties (1).

The discretion given to the Court by this Order will only be exercised in cases where the rights of the absent party can be protected by the decree as if he were present; or at all events where the rights cannot be prejudiced by a decree made in their ab-Consequently, in a sait for the execution of a trust created for the benefit of creditors against the trustees. Sir James Wigram, V. C., refused to make a decree in the absence of the person who created the trust or his personal representative (i).

The Court will not at the hearing give leave to the plaintiff to amend by adding parties, if by so doing the nature of the case made by the bill will be changed (k); an order was however made at the hearing, that the plaintiffs should be at liberty to amend their bill by adding parties, as they should be advised, or by showing why they were unable to bring the proper parties before the Court (1).

The proper time for taking an objection for want of parties is Objection upon opening the pleadings, and before the merits are dis-ought to be cussed (m); but it frequently happens that after a cause has opening. been heard, the Court has felt itself compelled to let it stand over for the purpose of amendment (x) (2).

The objection for want of parties ought to proceed from a de-Objection fendant, for it has been decided that the plaintiff bringing his ought to procause to a hearing without proper parties, cannot put it off with-fendant. out the consent of the defendant (o). Cases of exception may

(i) Kimber v. Ensworth, 1 H. 293; see also May v. Selby, 1 Y. & C. 237; and Faulkner v. Daniell, 3 H.

(k) Deniston v. Little, 2 Sch. &

Lef. 11 n. (l) Milligan v. Mitchell, 1 M. & C.511, [Story Eq. Pl. § 541, note]. (m) Jones v. Jones, 3 Atk. 111.

(n) Ibid. (o) Innes v. Jackson, 16 Ves. 356; for the circumstances under which the defendant must support his ob-

jection by evidence, see Campbell v. Dickens, 4 Y. & C. 17, Exch. R.; Barker v. Railton, 11 Law Journ. N. 8., 372.

⁽¹⁾ Story Eq. Pl. § 236, note, in which it is said that the same rule has been adopted by the Supreme Court of the U. States, 53d rule of the Rules in

been adopted by the Spareme Court of the U. States, 53d rule of the Rules in Equity of S. C. of U. States, January Term, 1842. See Clymer v. James, Halst. Dig. 168; post, 342, note; Story Eq. Pl. § 339.

(2) See Felch v. Hooper, 20 Maine, 163, 164; Clark v. Long, 4 Rand. 451; Miller v. M'Can, 7 Paige, 452; Cabeen v. Gordon, 1 Hill, Ch. 53; R. Owing's case, 1 Bland. 292; Story Eq. Pl § 541; Robinson v. Smith, 3 Paige, 222; Mitchell v. Lenox, 2 Paige, 281; Evans v. Chism, 18 Maine, 223; Clifton v. Haig, 4 Demans. 331; ante, 334, 335, note.

The ordinary course in Chancery, where a want of proper parties appears at the hearing, is for the cause to stand over in order that they may be added. Colt v. Lasnier, 3 Cowen, 320.

At the hearing, occur, where, for instance, the plaintiff was not aware of the existence of persons whose claims could touch the interests of those who were upon the record; but that ought to be clearly established; and the plaintiff ought to apply as soon as he has obtained that knowledge (p) (1).

Plaintiff may waive relief against absent parties.

A plaintiff may at the hearing obviate an objection for want of a particular party, by waiving the relief he is entitled to against such party (q); and where the evident consequence of the establishment of the rights asserted by the bill, might be the giving to the plaintiff a claim against persons who are not parties, the plaintiff by waiving that claim may avoid the necessity of making those persons parties (r) (2). This, however, cannot be done to the prejudice of others (s).

or undertake to give effect to their rights.

In some cases the defect of parties has been cured at the hearing by the undertaking of the plaintiff to give full effect to the utmost rights which the absent party could have claimed, those rights being such as could not affect the interest of the defendants. Thus, where a bill was filed to set aside a release which had been executed in pursuance of a family arrangement, in consequence of which a sum of stock was invested in the names of trustees for the benefit of the plaintiff's wife and unborn children, which benefit would be lost if the release was set aside, the Master of the Rolls held, that the trustees of the settlement were necessary parties, in order to assert the right of the children, but upon the plaintiff's counsel undertaking that all the monies to be recovered by the suit should be settled upon the same trusts for the benefit of the plaintiff's wife and children, his Honor permitted the cause to proceed without the trustees, and ultimately, upon the undertaking of the plaintiff, declared that the plaintiffs were not bound by the release (t) (3).

Decree will not bind absentees.

As a decree made in the absence of proper parties may be reversed, and at all events will not bind those who are absent, or those claiming under them (u) (4); great care should be taken

(p) Ibid. (q) Pawlet v. The Bishop of Lincoln, 2 Atk. 296.

(t) Harvey v. Cooke, 4 Russ. 35; and see Walker v. Jeffreys, 1 Hare, 296, and 341. (u) Prac. Reg. 299.

(r) Lord Red. 180.

(s) Ibid.

See Thompson v. Peeble, 6 Dana, 392.
 Story Eq. Pl. § 228, 127, 129, 213, 214.
 So in some cases, when all the parties are not before the Court, the merits, as between those parties who are before the Court, may be decided at their request. See Wickliffe v. Clay, 1 Dana, 103.

(3) Story Eq. Pl. § 220.

(4) Story Eq. Pl. § 236; Whiting v. Bank of U. S., 13 Peters, 14;

Spring v. Jenkins, 1 Ired. Eq. 128.

to have the necessary parties before the Court at the hear- At the hearing. ing (x) (1), because, as we have seen before, he cannot then apply for leave to add parties without the consent of the defendant.

The most usual way of adding parties is by amendment of the Of amending original bill, though sometimes it is done by supplemental bill, bill by adding and the Court will suffer the plaintiff to amend his bill by adding parties. parties at any time before the examination of witnesses has taken place (2).

An order to amend by adding parties allows of the introduction As co-plainof apt words to charge them; but it seems that the plaintiff, if it is tiffs. necessary, should apply for liberty to add allegations applicable to the case of the proposed new parties, as this is not included in

(z) For cases in which the defect voluntary appearance of the hearing, of parties has been remedied by the vide ante, p. 237.

 Joy v. Wirtz, 1 Wash. C. C.517.
 Where new parties are added in a case after the testimony is taken, the cause should be heard on bill and answer as to such new defendants. Smith c. Baldwin, 4 Hel. & John. 331.

In respect to amendments as to parties, the Courts are more liberal than as to other amendments. Courts of Equity will not dismiss bills absolutely, for want of proper parties, where the plaintiff shows enough to give color to his claim for relief against the parties not before the Court. Allen v. Smith, 1 Leigh, 331; Story Eq. Pl. § 236; Hutchinson v. Reed; 1 Hoff. Ch. R. 336.

If the objection of the want of the proper parties is taken by plea or demurrer, it is a matter of course to dismiss the plaintiff's bill upon the allow-cace of the plea or demurrer, unless the plaintiff takes issue on the plea, or obtains leave to amend on the usual terms. Van Epps v. Van Deusen, 4

Paige, 64, 76.

If the defendant makes no objection for want of proper parties, either by ples, answer or demurrer, and raises that objection for the first time at the hearing, the bill should not be dismissed, where the defect can be remedied by an amendment or a supplemental bill, provided the plaintiff elects to bring the proper parties before the Court within a reasonable time; ib. p. 76. bring the proper parties before the Court within a reasonable time; ib. p. 76. The only exception to the rule arises where it appears that the necessary parties have been left out of the bill by the fraud or bad faith of the plaintiff, ib. See Rowland v. Garman, 1 J. J. Marsh, 76; Parberry v. Goram, 3 Bibb, 108; Cabeen v. Gordon, 1 Hill, (8. C.) Ch. 53; Hutchinson v. Reed, 1 Hoff. Ch. R. 320; Clifton v. Haig, 4 Desaus, 331; New London Bank v. Lee, 11 Conn. 112; Malin v. Malin, 2 John. Ch. 338; Nash v. Smith, 6 Conn. 422; Rogers v. Rogers, 1 Hopkins, 515; S. C. 1 Paige, 168; S. C. 2 Paige, 467; Bland v. Wyatt, 1 Hen. & Munf. 43; Sears v. Powell, 5 John. Ch. 259; Bowan v. Idley, 6 Paige, 46; Ensworth v. Lambert, 4 John. Ch. 605. John. Ch. 605.

If the bill is dismissed for want of the proper parties, it should not be dismissed absolutely, but without prejudice to the right of the plaintiff in any future litigation. See Craig v. Barbour, 2 J. J. Marsh. 220; Thompson v. Clay, 3 Monroe, 361; Van Epps v. Van Deusen, 4 Paige, 76; Miller v. M'Can, 7 Paige, 452; Huston v. M'Clarty, 3 Litt. 274; Steele v. Lewis, 1 Monroe, 49; Royse v. Tarrant, 6 J. J. Marsh. 567; Story Eq. Pl. § 236; West v. Randall, 2 Mason, 181; Mechanics Bank of Alexandria v. Setons, 1 Peters 336. Hunt v. Wickliffe 8 Paters 215

1 Peters, 306; Hunt v. Wickliffe, 8 Peters, 215.

At the hearing, the liberty to amend by adding parties (y) (1). A plaintiff is not obliged, in adding parties by amendment, to make them defendants, he may, if he pleases, apply for leave to make them co-plaintiffs, and he has been permitted to do so by special motion after the defendants have answered the original bill (z) (2). observed, however, that after answer, the addition of a co-plaintiff is not a matter of course; and that in such case the granting or refusing of an order to amend by adding parties as plaintiffs, is discretionary in the Court (a).

## SECTION IV.

## Of the Joinder of Parties who have no Interest in the Suit.

As defendants

Agents.

Residuary legatee.

insolvents

Ir has been before stated, that no one should be made a party to a suit against whom, if brought to a hearing, there can be no decree (b) (3); thus an agent, for the purchase of an estate, is not a necessary party to a bill (4) against his employer for a specific performance, although he signed the memorandum for the purchase in his own name (c), and so a residuary legatee need not be made a party to a bill against an executor for a debt or legacy, and for the same reason in a bill brought by or against the assign-Bankrupts and ees of a bankrupt or insolvent in respect of the property vested in them, under the bankruptcy or insolvency, the bankrupt or insolvent should not be parties (d); and in a suit to ascertain the property in a certain share litigated between two claimants, the

> (y) Hand 77. Palk v. Lord Clinton, 12 Ves. 48; Mason v. Franklin, 1 Y. & C. 242.

> (z) Hichens v. Congreve, 1 Sim. 500.

(a) The practice relating to the addition of parties by amendment is treated of in the next Chapter, in the

Section concerning "The Amending of Bills.

(b) 3 P. Wms. 311, n. 1. (c) Kingley v. Young, Coop. Tr. Pl. 42.

(d) Vide ante, Bankrupt Defendants Parties.

M'Can, 7 Paige, 451.

(3) Todd v. Sterrett, 6 J. J. Marab. 432; Story Eq. Pl. § 231 and notes

and cases cited.

and cases circu.

(4) Story Eq. Pl. § 231.
See Allin v. Hall, 1 A. K. Marsh. 527; Orkey v. Bend, 3 Edw. 482;
Jones v. Hart, 1 Hen. & Munf. 470; Davis v. Simpson, 5 Har. & John. 147.

If an agent, selling land, binds himself individually, he should be a party to a suit touching the sale. Alexander v. Lee, 3 A. K. Marsh. 484.

⁽¹⁾ When the plaintiff is allowed to amend on account of the want of proper parties, he possesses the incidental right to amend by charging all such matters, as constitute the Equity of his case, against the new parties. Stephens v. Frost, 2 Younge & Coll. 297; Story Eq. Pl. § 541 and note.

(2) See Milligan v. Mitchell, 1 Mylne & Craig, 433, 442, 443; Miller v.

banking company is not a necessary party (e). Upon the same As Defendants principle, persons who are mere witnesses, and may be examined Mere witnesses as such, ought not to be made defendants (f) (1); even though ses. the object of the bill is to obtain a discovery in aid of an action at Law in which their discovery would be more effectual than their examination (g) (2).

This rule is, however, liable to exceptions; thus in cases where Members and under certain circumstances a discovery upon oath is desirable officers of corfrom individual members of a corporation aggregate, or from the officers of a corporation, such members or officers may be made defendants (h) (3); with respect to the latter case, it has been observed by Lord Eldon, that "the principle upon which the rule has been adopted is very singular: it originated with Lord Talbot (i), who reasoned thus upon it, that you cannot have a satisfactory answer from a corporation, therefore you make the secretary a party, and get from him the discovery you cannot be sure of having from them, and it is added, that the answer of the secretary may enable you to get better information." "The first of these principles," continues his Lordship, " is extremely questionable, if it were now to be considered for the first time; and as to the latter, it is very singular to make a person a defendant in order to enable yourself to deal better, and with more success, with those whom you have a right to put upon the record; but this practice has so universally obtained without objection, that it must be considered established (k)."

Other persons are mentioned by Lord Eldon as affording ex- Agents to sell, ceptions to the rule before laid down, that mere witnesses cannot auctioneers, be made parties to a suit, viz. agents to sell, auctioneers, &c., who have been made defendants without objection (1); his Lordship, however, appears to have thought that the practice of making such persons parties arose originally from their having some interest, such as holding deposits, which might entitle the plaintiff to relief against them, and it has been since held that an agent who bids

(h) Vide ante, Corporations, 180.
(i) Wych v. Meal, 3 P. Wms. 210.
(k) 7 Ves. 289.

(l) Ibid.

⁽e) Scawin v. Scawin, 1 Y. & C. 68.

⁽f) Plummer v. May, 1 Ves. 426; How'v. Best, 5 Mad. 19.

⁽g) Fenton v. Hughes, 7 Ves. 288.

⁽¹⁾ Footman v. Pray, R. M. Charlt. 291; Story Eq. Pl. § 234, 734; Fen-(1) Footman v. Fray, R. M. Charit. 221; Story Eq. Fl. 9 204, 104; Fenton v. Hughes, 7 Sumner's Vesey, 287, Perkins's note (a) and cases cited; Newman v. Godfrey, 2 Bro. C. C. (Perkins's ed.) 332; 2 Story Eq. Jur. § 1499; Wigram Discovery, (Am. ed.) p. 165, § 235; Hare, 65, 68, 73, 76.

(2) See next preceding note, and ante, 180, note.

(3) See Fenton v. Hughes, 7 Sumner's Vesey, 287, Perkins's note (a) and

cases cited to this point; ante, 180 and note.

As Defendants at an auction for an estate, and signs the memorandum in his own name for the purchase, need not be made a co-defendant with his employer to a bill for the specific performance of such agreement (m). In Dummer v. The Corporation of Chippenham (n), Lord Eldon also mentions as cases of exception to the general rule above referred to, those of arbitrators and attornies. With respect to arbitrators, however, it is a rule, that in general an arbitrator cannot be made a party to a bill for the purpose of impeaching an award, and that if he is, he may demur to the bill, as well to the discovery as to the relief (o) (1). In some cases, nevertheless, where an award has been impeached on the ground of gross misconduct in the arbitrators, and they have been made parties to the suit, the Court has gone so far as to order them to pay the costs (p) (2). In such cases Lord Redesdale considers it probable that a demurrer to the bill would not have been allowed (q), and in Lord Lonsdale v. Littledale (r) a demurrer, by an arbitrator, to a bill of this nature was in fact overruled, though not expressly upon the ground of the impropriety of making an arbitrator a party, but because the bill charged certain specific acts which showed combination or collusion between him and one of the parties, and made him the agent for such party, and which the

Arbitrators.

Court therefore thought required an answer (3). But although arbitrators may be made parties to a bill to set aside their award, they are not bound to answer as to their motives in making the award, and they may plead to that part of the bill in bar of such discovery (s); but it is incumbent upon them, if they are charged with corruption and partiality to support their plea by showing themselves incorrupt and impartial, or otherwise the Court will give a remedy against them by making them pay

discovery.

May plead to

but must answer charges of corruption.

May be made to pay costs.

costs (t).

From the preceding cases it may be collected that arbitrators can only be made parties to a suit where it is intended to fix them with the payment of costs, in consequence of their corrupt or fraudulent behavior, and in such cases it is apprehended that the bill ought specifically to pray that relief against them. The same

(m) Coop. Tr. P. 42. (n) 14 Ves. 252.

(o) Steward v. E. I. Company, 2 Vern. 380; Lord Red. 162.

(p) Chicot v. Lequesne, 2 Ves.

315; Lingood v. Croucher, 2 Atk. **3**95, 950.

(q) Lord Red. 162. (r) Ves. J. 451. (s) Anon. 3 Atk. 644.

(t) Lingood v. Croucher, supra.

Story Eq. Pl. § 231.
 Story Eq. Pl. § 232 and notes.
 2 Story Eq. Jur. § 1500, and cases cited.

rule also applies to the other case of exception before alluded to, As Defendants as having been mentioned by Lord Eldon, namely, that of attor- Attornies. nies, who can only be made parties to a suit in cases where they have so involved themselves in fraud, that a Court of Equity, although it can give no other relief against them, will order them to pay the costs (1). Thus, where a solicitor assisted his client in obtaining a fraudulent release from another, he was held to be properly made a party, and liable to costs if his principal was not solvent (u). The same rule applies to any other person acting in Agents in the capacity of agent in a fraudulent transaction, as well as to an transactions. attorney or solicitor (x) (2). It is to be observed, that in such cases, if an attorney or agent is made a party, the bill must pray that he may pay the costs, otherwise a demurrer will lie. In Le Texier v. The Margravine of Anspach (y), one of the questions Married before the Court was, whether a married woman could be made a women. party to a suit on the allegation, that in certain contracts which were the subject of litigation, she had acted as the agent of her husband, and that she had in her possession vouchers, &c., the discovery of which might assist the plaintiff in his case; the bill, which did not pray any relief against the wife, had been demurred to, and Lord Eldon allowed the demurrer on the ground that she was merely made a defendant for the purpose of discovery, and that no relief was prayed against her. His Lordship said, "I give no judgment as to what would have been the effect if the bill had prayed a delivery to the plaintiff of the vouchers, which are charged to be in the hands of the wife; it is, however, simply as far as relief goes, a bill against the husband only, and against the wife a bill for discovery only. The consequence is, that independent of her character as wife, the case must be considered as one of those in which the Court does sometimes allow persons to be made parties, against whom no relief is prayed, and the only case of that kind is that of the agent of a corporation." With respect Attornies or to the propriety of making an attorney or agent a party, merely agents having because he has deeds or other documents in his possession, Lord deeds, &c. Eldon, in Fenwick v. Reed (z), observed, that generally speaking, and prima facie, it is certainly not necessary to make an attorney a party to a bill seeking a discovery and production of title-

⁽u) Bowles v. Stewart, 1 Sch. &

⁽y) 15 Ves. 164.(z) 1 Mer. 123.

⁽z) Bulkeley v. Dunbar, 1 Anst.

Story Eq. Pl. § 232.
 Story Eq. Pl. §38.

As Defendants deeds, merely because he has them in his custody, because the possession of the attorney is the possession of his client, but cases may arise to render such a proceeding advisable, as if he withholds the deeds in his possession, and will not deliver them to his client on his applying for them (1).

When a defendant, not interested, may demur.

Where a person who has no interest in the subject-matter of the suit, and against whom no relief is prayed, is made a party to a suit for the mere purpose of discovery; the proper course for him to adopt, if he wishes to avoid the discovery, is to demar (a). If, however, the bill states that the defendant has or claims an interest, a demurrer which admits the bill to be true, will not of course hold, though the defendant has no interest, and he can then only avoid answering the bill by plea or disclaimer (b).

Or protect himself from discovery by answer.

The question whether a party who is a mere witness can by answer protect himself from the discovery required, appears to have given rise to some difference of opinion. In Cookson v. Ellison (c), the plaintiff made a person defendant who was merely a witness, and might have been examined as such, and therefore should have demurred to the bill. Instead of demurring, however, the defendant put in an answer, which not having satisfied the plaintiff as to one interrogatory, an exception was taken, and the Master reported the answer sufficient; but upon the case coming before Lord Thurlow, upon exception to the Master's report, his Lordship held that as the defendant had submitted to answer, he was bound to answer fully. In a subsequent case of Newman v. Godfrey (d), however, Lord Kenyon, M. R., appears to have entertained a different opinion. In that case, the defendant, who was a mere clerk, was alleged in the bill to be a party interested in the property in litigation, and in support of such allegation various statements were made, showing in what manner his interest arose; he put in an answer denying all the statements upon which the allegation of his being interested was founded, and disclaiming all personal interest in the subject-matter; and to this answer exceptions were taken by the plaintiff, because the defendant had not answered the subsequent parts of the bill, which exceptions were disallowed by the Master; and upon the question coming on before Lord Kenyon, upon exceptions to the Master's reports, he

⁽a) Lord Red. 189. (b) Ibid.; Plummer v. May, 1 Ves.

⁽c) 2 Bro. C. C. 252. (d) 2 Bro. C. C. 332.

⁽¹⁾ Smith, Ch. Pr. (2nd Am. ed.) 677, 678.

thought the Master was right in disallowing the exceptions, be- As Defendants cause the defendant had reduced himself to a mere witness, by denying his interest and disclaiming; so that even supposing he had an interest he could not, having disclaimed, have availed himself of it. These contradictory decisions have been remarked upon by Lord Eldon in two subsequent cases (e); and his Lordship's observations in those cases have been considered, as approving of Lord Thurlow's decisions in Cookson v. Ellison (f). Nothing, however, can be collected from what Lord Eldon has said in either of these cases, as indicating an opinion either one way or the other, and at the period when they were before him, the doctrine that a party could not, except in particular cases, protect himself by answer from making a full answer to all the matters contained in a bill, does not appear to have been so strictly adhered to as it was subsequently (g) (1).

When a plaintiff finds that he has made unnecessary parties to How plaintiff his bill, he may either dismiss his bill as against them, or apply to may get rid of the Court for leave to amend his bill by striking out their names; parties. in either case, however, the order will only be made on payment of their costs (2), as by striking them out as defendants, the plaintiff deprives them of the opportunity of applying for their costs at the hearing (h).

The preceding observations, with regard to the joinder in the Joinder of suit, of persons who have no interest, beneficial or otherwise, in such as cothe subject-matter, refer to cases where they are made parties de-proper. fendants; the rule, however, that persons who have no interest in the litigation, cannot be joined in a suit with those who have, applies equally to prevent their being joined as co-plaintiffs.

(c) Fenton v. Hughes, 7 Ves. 288; Baker v. Mellish, 11 Ves. 75, 76.

303, and post, Answer.

(a) Wilkinson v. Belsher, 2 Bro. 272. (f) Supra.
(g) Vide Dolder v. Ld. Hunting-field, 11 Ves. 283; Faulder v. Stu-

⁽¹⁾ See a discussion of this subject in Wigram Discovery, (Am. ed.) Pl. 148, 149, &c. p. 86, 87 et. seq. See also Cuyler v. Bogert, 3 Paige, 186; Corbett v. Hawkins, 1 Younge & Jer. 425; Phillips v. Prevost, 4 John. Ch. 205; Whitney v. Belden, 1 Edw. 386; Method. Epis. Ch. v. Jacques, 1 John. Ch. 65; Ogden v. Ogden, 1 Bland. 288; Salmon v. Clagett, 3 Bland. 125; Ruypers v. Dutch Ref. Ch. 6 Paige, 570. In Andrews v. Fisher, 3 My. & Cr. 526, it was held, that a defendant might to some extent, by answer resist discovery. This point, relating to the extent to which a defendant must answer, is said to have been a subject of much controversy, and of various conflicting opinions. 2 Madd. Ch. Pr. (4th Am. ed.) 339, 340; Bank of Utica v. Messereau, 7 Paige, 517; Fonbl. Eq. B. 6, ch. 3, § 2 and notes; Story Eq. Pl. § 846 et seq. and notes; Cookson v. Ellison, 2 Bro. C C. (Perkins's ed.) 252 and notes.

(2) Covenhoven v. Shuler, 2 Paige, 122. (2) Covenhoven v. Shuler, 2 Paige, 122.

As co-plaintiffs

This has been the doctrine of the Court for a great length of time; thus, in the case of The Mayor and Alderman of Colchester (i), Lord Chancellor Parker said, that although Equity goes so far as to give either side leave to examine a defendant de bone esse, yet this rule has not been extended to a plaintiff, in which case, if he be an immaterial plaintiff, the defendant may demur (1). So in Troughton v. Getley (j), it was said and not denied, that if a plaintiff was an immaterial party the defendant might The same question was twice decided by Sir J. Leach, V. C. In Cuff v. Platell (k), a general demurrer was allowed expressly on the ground, that though one of two plaintiffs had an interest in the subject of the suit, the other had no interest in it. In Makepeace v. Haythorne (1), a defendant pleaded in bar to a bill for an account that one of the plaintiffs was an uncertificated bankrupt; and though the other plaintiff had such an interest as would sustain the suit if he had sued alone, and though the persons named in the plea as assignees of the bankrupt defendant were already parties in respect of some of the transactions mentioned in the pleadings, so that nothing could turn on any alleged want of parties (even if the plea had taken such an objection, which it did not do), the Vice-Chancellor allowed the plea expressly on the ground that one of the parties had no interest in the subject-matter of the suit (2).

The same doctrine was followed by Lord Lyndhurst, in the King of Spain v. Machado (m), in which several plaintiffs having an interest in the matter of the suit were joined with others who had not, but were merely the agents of their co-plaintiffs, and a demurrer to the whole bill was allowed (3). And in Page v. Townsend (n), where a bill was filed by four plaintiffs to restrain the piracy of engravings published in this country, and it appeared upon the bill that all four plaintiffs were jointly interested in the plates or designs from which the engravings were taken, but that two of them only published them in England for their own benefit, the other two plaintiffs being the publishers of the same engravings in Paris for their own benefit; The V. C. of England allowed a demurrer, because two of the plaintiffs only appeared to have an interest in the suit, the publishers in Paris not being

⁽i) 1 P. Wms. 595. ) 1 Dick. 382. (k) 4 Russ. 242.

⁽l) Ibid. 244. m) Ibid. 225. (n) 5 Sim. 395.

Story Eq. Pl. § 390.
 Story Eq. Pl. § 509, 551, 544; Clarkson v. De Peyster, 3 Paige, 336.
 Story Eq. Pl. § 544.

represented as having any interest in the work published in Great As co-plaintiffs Britain (o).

But although persons having no interest in the subject-matter In supplemenof a suit, cannot as we have seen be joined as co-plaintiffs, yet tal bills. where persons having at the time a joint interest, file an original bill, and afterwards one of the co-plaintiffs parts with his interest, such co-plaintiff may afterwards join in a supplemental bill filed for the purpose of bringing additional matter before the Court; because, although he may have parted with his interest in the subject-matter, he is still interested in the suit in respect of his liability to costs. Thus, where a bill was filed in the Exchequer by certain persons on behalf of themselves, and other members of a Joint-Stock Company, to which an answer was put in and a decree made, setting aside certain contracts between the plaintiffs and the defendant, and directing various accounts and inquries, and afterwards a supplemental bill was filed in the name of the same plaintiffs against the same defendant, seeking amongst other things a lien on a part of the purchase money, which had been paid to the defendant, to which a plea was put in by the defendant on the ground that one of the plaintiffs in the supplemental bill had, previously to the filing of it, parted with all his interest in the partnership, &c., Lord Lyndhurst, C. B., overruled the plea, being of opinion that the supplemental bill was nothing more than a continuation of the original bill, and his Lordship's decision was afterwards confirmed by Lord Abinger, C. B., upon a rehearing (p).

It is to be observed, that the common case of joining an auc-Auctioneer tioneer and the vendor in a bill against a purchaser, is no excep- and vendor. tion to the rule above referred to, because the auctioneer has an interest in the contract, and may bring an action upon it; he is also interested in being protected from the legal liability which he has incurred in an action by the purchaser to recover the deposit. Nor does the circumstance of the assignor and the assignee of a chose in action being capable of suing together constitute an exception, because, although the assignor has parted with his beneficial interest in the subject-matter, he still is interested as the owner of the legal estate (q) (1).

(o) Vide etiam, Delondre v. Shaw, 2 Sim. 237; and Glyn v. Soares, 3 M. & K. 468, 472.

(p) Small v. Attwood, 1 Young & Collier, 39, Exc. R. (q) Ryan v. Anderson, 3 Mad. 174.

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⁽¹⁾ See Story Eq. Pl. § 153 and notes; ante, 247, 248 and notes.

Misjoinder of plaintiffs how taken advantage of.

If the fact of one of the plaintiffs having no interest in the suit, appears on the bill, advantage must be taken of it by demurrer (r) (1). If the fact does not appear upon the bill it may be brought forward by plea (s) (2) and where at the hearing, the claim of one of two co-plaintiffs failed entirely whilst that of the other succeeded, the V. C. of England dismissed the bill as against both plaintiffs, but without prejudice to the right of the one who had succeeded to file a new bill (t).

Upon a simple principle, in cases where all the plaintiffs have an interest in the subject of the suit, but their interests are distinct and several, they will not be allowed to sue together as coplaintiffs (3); thus in Hudson v. Maddison (u), where a bill was filed by five several occupiers of houses in a town, to restrain the erection of a steam engine, alleging that it would be a nuisance to each of them, the V. C. of England dissolved an injunction obtained in the suit, upon the ground that each occupier had a distinct right of suit, and therefore that they could not sue as coplaintiffs.

(r) Cuff v. Platell, King of Spain v. Machado, Page v. Townsend, Delondre v. Shaw, ubi supra.

(s) Makepeace v. Haythorne, ubi supra.

(t) Cowley v. Cowley, 9 Sim. 299; it seems, however, that in general an

objection of this kind, if not raised upon the pleadings, will not be allowed at the hearing, Eades v. Harris, 2 Y. & C. 230, Raffety v. King, 1 Keen, 601; Cashell v. Kelly, 2 Dr. & W. 181.

(w) 12 Sim. 416.

(1) Story Eq. Pl. § 541-544; Bowie v. Minter, 2 Ala. (N. S.) 406.
(2) In Watertown v. Cowen, 4 Paige, 510, it was held too late to take a mere formal objection of this kind for the first time at the hearing. See Dickinson v. Davis, 2 Leigh, 401; Sheppard v. Starke, 3 Munf. 29; Mayo v. Murchie, ib. 358; Story Eq. Pl. § 544, 232, 236, 569.

If the misjoinder is of parties plaintiffs, all the defendants may demur;

Pl. § 544 and notes.

(3) Ohio v. Ellis, 10 Ohio, 456; Poynes v. Creagh, 2 Irish Eq. 190; Besty v. Judy, 1 Dana, 103; Boyd v. Hoyt, 5 Paige, 65; Story Eq. Pl. § 279, 530, 531; Yeaton v. Lenox, 8 Peters, 123; Harrison v. Hogg, 2 Vesey, jr. 323, 328; Brinkerhoff v. Brown, 6 John. Ch. 139, 150–153; Clarkson v. De Peyster, 3 Paige, 320; Lentilhon v. Moffat, 1 Edw. Ch. 451; Hallett v. Hallett, 2 Paige, 15; Egbert v. Woods, 3 Paige, 517; Van Cleef v. Sickles, 5 Paige, 505; Baily v. Bruton, 8 Wendell, 339; Finley v. Harrison, 5 J. J. Marsh. 158; Kay v. Jones, 7 J. J. Marsh. 37.

If the misjoinder is of parties plaintiffs, all the defendants may demur; such a misjoinder is a proper ground of objection. If the misjoinder is of parties as defendants, those only can demur, who are improperly joined. But if a person is improperly joined as a defendant, who is without the jurisdiction, and is therefore a party only by virtue of the usual prayer of process, such misjoinder will not affect the cause; for until he has appeared and acted, no decree can be had against him. And in cases of misjoinder of plaintiffs, the objection ought to be taken by demurrer; for if not so taken, and the Court proceeds to a hearing on the merits, it will be disregarded, at least, if it does not materially affect the propriety of the decree. Story Eq. Pl. § 544 and notes.

### CHAPTER VI.

OF THE BILL.

### Section I.—Of the different sorts of Bills.

IT has been before observed, that a suit on the Equity side of What are origthe Court of Chancery is commenced on behalf of a subject by pre- inal bills. ferring what is termed an English bill (1). If commenced by the Attorney-general on behalf of the Crown, or of those partaking of its prerogatives, or under its protection, the commencement of the suit is by information (a) (2).

English bills, if they relate to matters which have not previous- In Chancery. ly been brought before the consideration of the Court, are called original bills, and form the foundation of most of the proceedings before what is termed the extraordinary or equitable jurisdiction of the Court of Chancery (3). The same form of instituting a In the Exchesuit is also in use in all other equitable jurisdictions in the king-quer, and other jurisdictions. dom.

3 sides original bills, there are other bills in use in Courts of Bills not origy, which are preferred when it becomes necessary to supply inal. efects which may exist either in the form of the original bill, ly have been produced by events subsequent to the filing of it. of this description are called bills which are not original. times a person, not a party to the original suit, seeks to bring In nature of roceedings and decree in the original suit before the Court, original bills. ne purpose either of obtaining the benefit of it, or procuring eversal of the decision which has been made in it. The bill h he prefers for this purpose, is styled a bill in the nature of iginal bill (4). sides the different divisions of bills here enumerated, origi- Division of.

(a) Ante, Chap. 1.

Story Eq. Pl. § 7
 Story Eq. Pl. § 8.
 Story Eq. Pl. § 16, 22.
 Story Eq. Pl. § 16, 22.
 Story Eq. Pl. § 16, 20, 21.

Different sorts nal bills are usually divided into: — 1. Original bills praying reof Bills. lief; and 2. Original bills not praying relief (b) (1).

Original bills

Original bills praying relief, are again subdivided into three praying relief. heads: - 1. Original bills, praying the decree of the Court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person against whom the bill is exhibited. 2. Bills of interpleader; and, 3. Certiorari bills (c) (2).

Praying no re-Original bills not praying relief, are of two kinds: - 1. Bills to lief. perpetuate the testimony of witnesses; and 2. Bills of discovery (3).

> As original bills of the first kind are those most usually exhibited, the reader's attention will in the present Chapter be principally directed to them; the other descriptions of bills will be more particularly considered when we come to consider the practice of the Court applicable to the particular suits of which they are the foundation.

> Bills which are not original, or which are merely in the nature of original bills, will be separately considered in a future part of the work.

#### SECTION II.

# Of the Authority to file a Bill.

Need not be in writing.

THE first step to be taken by a party who proposes to institute a suit in Chancery, is to authorize a solicitor practising in the Court to commence and conduct it on his behalf. It does not seem to be necessary that such authority should be in writing (d). although it would, perhaps, be better that solicitors before they commence suits should be in possession of some written authority for that purpose; but in either case, in order to warrant a solicitor in filing a bill, the authority, be it in writing or by parol, ought to be special; and it has been held that a general authority to act as solicitor for a party, will not be sufficient to warrant his commenc-

But must be special.

> (e) Wilson v. Wilson, 1 Jac. & W. 457. (b) Lord Red. 39. ) Ibid. (d) Lord v. Kellett, 2 Milne & K.

⁽¹⁾ Story Eq. Pl. § 17. (2) Story Eq. Pl. 18.

⁽³⁾ Story Eq. Pl. § 19.

ing a suit on his behalf (e), although, under a general authority, a Practice where solicitor may defend a suit for his client (f) (1).

filed without authority.

The rule which requires a solicitor to be specially authorized to commence a suit on behalf of his client, applies as well to cases From all plainwhere the party sues as a co-plaintiff, or as a next friend (g), as to cases where he sues alone (2); and even to cases where his name is merely made use of pro forma. In Wilson v. Wilson (h), Lord Eldon said, "I cannot agree that making a person a plaintiff is only pro forma; and I am disposed to go a great way in such cases, for it is too much for solicitors to take upon themselves to make persons parties to suits, without a clear authority; there are very great mischiefs arising from it."

If a solicitor files a bill in the name of his client, without hav- Practice where ing a proper authority from him for so doing, the course for the solicitor withclient to pursue, if he wishes to get rid of the suit, is to move that out authority. the bill may be dismissed, and that the costs of the suit as between solicitor and client may be paid not by the plaintiff, but by the solicitor filing the bill (i) (3). This motion may be made by the plaintiff in person, or he may, by warrant under his hand and seal, disclaim the bill as being brought without his order or privity, or against his order, though with his privity, and empower some counsel to make the motion (k); in which case, after the motion is made, the warrant must be delivered to the registrar, and the Court will order it to be filed (1). If a bill be exhibited in the On behalf of name of a married woman against her husband, it may, upon affi-feme covert. davit that she knew nothing of it, or had not consented to it, be dismissed (m). A motion to dismiss a bill, as having been filed without the privity or consent of the plaintiff, must be accompanied by an affidavit of the plaintiff himself, that the bill had been filed without any authority from him; and to avoid the effect of such an application, the solicitor against whom it is made must show distinctly, upon affidavit, that he had a special authority

 ⁽f) Wright v. Castle, 3 Mer. 12.
 (g) Ward v. Ward, 6 Beav. 254.
 (k) Ubi supra.

⁽i) Allen v. Bone, 4 Beav. 493.

⁽k) Prac. Reg. 179.

⁽l) Ibid.

⁽m) Ibid. 60.

 ¹ Smith Ch. Pr. (2nd Am. ed.) 106, 107.
 Where a suit is commenced in the names of several persons by their solicitor, the Court will not inquire whether such suit was authorized by all, unless some of them object to the proceedings, or the adverse party shows affirmatively that the suit is commenced and carried on in the names of some of the parties without authority. Bank Commissioners v. Bank of Buffalo. 6 Paige, 497.

⁽³⁾ See 1 Smith Ch. Pr. (2nd Am. ed.) 107.

filed without authority.

Practice where from the party to institute the suit; and it will not be sufficient to assert generally, in opposition to the plaintiff's affidavit, that authority had been given. In Wright v. Castle (n), the affidavit of the plaintiff was met by another on the part of the solicitor, stating, that an action had been brought by the defendant against the plaintiff, on account of certain promissory notes, to restrain proceedings in which action the bill had been filed, although not by the express directions of the plaintiff, yet in the course of business, and by virtue of a general authority as the plaintiff's solicitor; but Lord Eldon did not consider such authority sufficient.

Previously to such an application being made, notice should be given to the solicitor, and also to other parties in the cause. The motion should be made as soon as possible after the plaintiff has become acquainted with the fact of the suit having been instituted in his name: for although as between him and the solicitor, the mere fact of the plaintiff having neglected to move that his name should be struck out from the record, will not exonerate the solicitor (o); yet as between the plaintiff and the other parties, the Court, if there has been delay on his part in making such spplication, will not generally dismiss the bill, but will so frame the order, as not to prejudice any of the parties to the cause (p).

The last observation applies more especially to cases, where the person whose name has been used without due authority, is coplaintiff with others; for it can scarcely happen, where he is sole plaintiff, that defendants should have an interest in resisting an application to dismiss the bill with costs (except indeed after decree); but where he is co-plaintiff, it frequently happens, that dismissing the bill would interfere with the interests of the other plaintiffs, or diminish the security of the defendants for costs; in such cases, the motion will usually be saved to the hearing, and then the solicitor will be ordered to pay all the costs and expenses of the party whose name has been used without authority. And further than that, the solicitor was, in the case of Dundas v. Dutens (q), ordered to pay to the defendants the difference between taxed costs and their costs and expenses.

Where a co-plaintiff was not apprised that his name had been made use of without his authority till after the bill had been dismissed with costs, and he was served with a subpæna to pay them,

⁽n) Supra. (o) Hall v. Laver, 1 H. 571; see also Burge v. Brutten, 2 H. 373, as to the lien of the solicitor upon a fund recovered in the cause.

⁽p) Titterton v. Osborne, 1 Dick. 351; and see Tarbuck v. Tarbuck, 6 Beav. 134. (q) 2 Cox, 241; and 1 Ves. J. 196.

Lord Eldon, upon motion, ordered the solicitor to pay to the de- Of obtaining fendant the costs, which were ordered to be paid by the plaintiffs to the defendant; and also to pay to the plaintiff who made the application his costs of the application, as between solicitor and tiff makes disolient (s). It is to be observed that, by the order made upon that covery after occasion, the solicitor was ordered to pay the whole costs to be decision. paid by all the plaintiffs to the defendants; but he was to be at liberty to make any application as to those costs as against the other plaintiffs as he should be advised (t).

Court

As connected with this subject, it may be noticed here, that Of obtaining in certain cases it is necessary, before a suit is commenced, to previous sanction of Court. obtain the sanction of the Court to its institution. The cases in which this is most usually done, are those in which the suit contemplated is for the benefit of an estate, which is already the subject of a proceeding in Court, and the expenses of which are to be paid out of such estate. Thus, where there is a suit pending Where assets in course of for the administration of assets, and it becomes necessary, in order administration to get in the estate, that a suit should be instituted against a debt- in Court. or to the estate: in such cases it is usual for the personal representative, previously to filing a bill, to apply in the administration suit for leave of the Court to exhibit a bill for that purpose. And Where receivso, where a suit has been instituted for the winding up partnership er appointed. accounts upon a dissolution, and a receiver has been appointed to collect the outstanding effects, if it is necessary in order to recover a debt due to the partnership, that the receiver should institute a suit for that purpose, application should be made to the Court, on the part of some of the parties, that the receiver may be at liberty to file the necessary bill in the names of the partners. It is to be observed that, in all such cases, the Court will not direct the institution of such a suit upon motion, although supported by affidavits, without previously referring it to the Master to inquire whether it will be for the benefit of the parties at whose joint expense it is to be; unless the other parties interested, being of age, and competent to consent, choose to waive such reference (u).

In the same manner where the property of an infant is the sub- In case of inject of a suit already depending, and it becomes necessary that fants, another suit should be instituted on behalf of the infant, it is usual before any steps are taken in it, to procure a reference to

⁽s) Wade v. Stanley, 1 Jac. & W. 674. (u) Musgrave v. Medex, 3 V. & B. 167.

⁽t) Reg. Lib. B. 1819 for 1835.

sanction of Court.

Of obtaining to the Master to inquire and state to the Court whether such contemplated proceedings will be for the benefit of the infant (z). is to be observed, however, that such reference can only be made where the property of the infant is already subject to the control and disposition of the Court in another suit; and that, in ordinary cases, where a person commences an original proceeding on behalf of an infant as a prochein amy, he is considered as taking upon himself the whole responsibility of it; nor will the Court, either before or after the commencement of the proceeding, grant a reference to the Master to inquire whether it will be for the infant's benefit at the instance of the prochein any himself (unless in cases where there are two or more suits brought by different next friends for the same object), although, as we have seen, it will sometimes do so at the instance of other parties (y).

or lunatics.

It has been before stated, that the committee of an idiot or lunatic ought, previously to instituting a suit on his behalf, to obtain the sanction of the Lord Chancellor to the proceeding, by petition under the commission (z); and that in the case of suits by the assignees of bankrupts, or insolvent debtors, it is necessary, previously to instituting the suit, to procure the sanction of the majority of the creditors in the manner pointed out by the Bankrupt Act, 6 Geo. IV. c. 16, s. 88 (a); and the Insolvent Debtors' Act, 1 Geo. IV. c. 119, s. 11 (b).

Omission to obtain sanction not taken advantage of by defendant.

It is to be observed, that, with respect to all the above-mentiontioned cases, in which it is stated to be right, previously to the institution of a suit, to obtain the proper sanction, the omission to obtain such sanction is not a ground upon which a defendant to the suit can object to its proceeding. Some doubt appears, as we have seen, to have existed upon this point with reference to suits commenced by the assignees of bankrupts or insolvent debtors; but that appears to have been completely set at rest by the decision of Sir J. Leach, in Piercy v. Roberts (c); which has been before referred to (d), and by a more recent decision of the Vice-Chancellor of England, in Casborne v. Barsham (e).

- (z) Vide ante, 109.
- (y) Ante, 108.
- (z) Ante, 132. (a) Ante, 93.

- (b) Ante, 97.
- c) 1 M. & K. 8.
- Ante, 96.
- (e) 6 Sim. 317.

#### SECTION III.

### By whom Prevared.

The solicitor being duly authorized, the next step in the institution of a suit is to have the bill properly prepared. The duty of drawing the bill ought, strictly, to be performed by the solicitor, Strictly by who is allowed a fee for so doing (f); but as the rules of the solicitor; Court require that the draft should be signed by counsel, who usually by is held to be responsible for its contents, and, as much of the sub-counsel. sequent success of the suit may depend upon the manner in which the bill is framed, it has been found more convenient in practice that the bill should be prepared, as well as signed, by counsel; and, accordingly, except in particular cases, instead of the draft of the bill being prepared by the solicitor, and laid before counsel for his perusal and signature, the instructions to prepare the bill are generally, in the first instance, laid before the counsel (8), who prepares the draft from those instructions, and afterwards affixes his signature to it (1).

The practice of counsel signing pleadings in Chancery began, Signature of as it is said, in Sir Thomas More's time, previously to which, it counsel; seems, the practice was, for the bill to be examined by one of the Masters in Chancery, in order that he might consider whether the matter contained therein was fitter to be dismissed by original or retained by subpara (g), but, however the practice began, the necessary to rule is now imperative that the signature of counsel must be subscribed, either to the draft or the engrossment of every bill before it is filed (A) (2); if it be not, or the hand be counterfeit or dis-

(f) 1 Turner & Ven. p. 3. Cha (g) Treatise on Maisters of the 302. Chauncerie, 1 Harg. Law Tracts, (h) Lord Red. 48.

⁽¹⁾ See Smith Ch. Pr. (2nd Am. ed.) 105, 106; Story Eq. Pl. § 47 and note; Cooper Eq. Fl. 18, 19.

⁽²⁾ Bills are usually signed by the solicitor and counsel alone, and not by the party, except in cases where an injunction is asked for, or a discovery sought, or an answer on oath is required from the defendant. Hatch v. Eustaphieve, 1 Clarke, 63.

If, however, the plaintiff sue in person, as he may, the bill must be signed by him. And in such case it would appear, that a bill need not be signed by counsel. See 1 Hoff. Ch. Pr. 97.

Still the general rule is, that every bill, whether original or not, must have the signature of counsel affixed to it. Story Eq. Pl. § 47, 269; 1 Smith Ch. Pr. (2nd Am. ed.) 106; Ayckbourn Ch. Pr. (Lond ed. 1844) 5, 6; Cooper Eq. Pr. 18. The 24th of the Equity Rules of the Supreme Court of the U. States, January Term, 1842, expressly requires the signature of counsel to the bill.

Signature of Counsel.

Objection taken by demurrer;

owned, the bill will be dismissed on the defendant's demurrer (i) Thus, in Kirkley v. Burton (k) a demurrer was allowed to an amended bill, because the name of counsel did not appear to the bill; and if it appear to the Court, upon inspection of the record or the office copy, that the bill has not been signed by counsel, the Court will, of its own accord, order it to be taken off the file (I) (2).

The usual course, however, in such a case, appears to be for

or motion.

the defendant to move that the bill may be taken off the file, and that the costs may be paid by the plaintiff. Upon such a motion, if any doubt arises as to whether the bill has been signed by counsel or not, the Court will refer it to the Master to inquire into the fact; and if he certifies that it was not signed by counsel, the bill will be ordered to be taken off the file and suppressed, and the plaintiff directed to pay the defendant his costs, to be taxed, &c. (m).

Reference to the Master.

Forgery of counsel's name.

Where it appeared that a solicitor had forged a counsel's name to a pleading, he was fined 201, and committed till the fine was The plaintiff was also fined 100l. (n).

Unnecessarv to sign original draft again; unless amended by another counsel.

Where the same counsel who signed the original bill amends his former draft, which has his signature, it is not necessary that he should sign the draft again, as the signature will be applied as well to the amendments as to the former draft: nor is it necessary that there should be a second signature to the record. But if the amendments are made by another counsel, then it is necessary that there should be a second signature either to the draft or to the engrossment (o) (3).

Order of nature.

By one of the orders of the Court, usually called Lord Claren-Court as to sig-don's Orders, it is ordered "that no counsellor do put his hand to any bill, answer or other pleading, unless it be drawn or at least perused by himself in the paper draft, before it is engrossed (which they shall do well, for their own discharge, to sign also after perusal); and counsel are to take care that the same be not stuffed with repetition of deeds, writings or records, in hec verba; but the effect and substance of so much of them only as is perti-

⁽i) Prax. Alen. 3.(k) 5 Mad. 378.

⁽l) French v Dear, 5 Ves. 547.

m) Dillon v. Francis, 1 Dick. 68; Pitt v. Macklew, 1 S. & S. 136, n.

⁽a) Whitlock v. Marriot, 1 Dick.

⁽o) Webster v. Threlfall, 1 S. & S. 135.

⁽¹⁾ Story Eq. Pr. § 269, 47, note; Cooper Eq. Pl. 18. (2) See 1 Smith Ch. Pr. (2nd Am. ed.) 295, 296.

nent and material to set down, and that in brief terms, without long and needless traverses of points not traversable, tautologies, multiplication of words, or other impertinencies, occasioning needless prolixity, to the end that the ancient brevity and succinctness in bills and other pleadings may be restored and observed; much less may any counsel insert therein matter merely criminous or scandalous, under the penalty of good costs to be laid on such counsel, to be paid to the party grieved, before such counsel can be heard in Court " (p) (1).

Signature of Counsel.

In a case (q) where the plaintiff had inserted in his bill scanda- Counsel signlous matter against one of the defendants, it was referred to the ing to pay Master to tax the costs of such scandal, and the Master taxed such dal. costs at 100%, but the Court and the Judges declared that the scandal was very great, yet, nevertheless, ordered that the costs should be reduced to 501., to be paid by the plaintiff to the defendant; and also that 51. more should be paid by Mr. Welcome, whose hand was set to the bill (2).

#### SECTION IV.

## Of the Matter of a Bill.

An original bill in Chancery is in the nature of a declaration General naat Common Law (r), or of a libel and allegation in the Spiritual ture of a bill in equity. Courts (s).

It was, in its origin, nothing but a petition to the King, which, after being presented, was referred to the Lord Chancellor, as the keeper of his conscience; and a bill still continues to be framed in the nature and style of a petition, though it is now, in the first instance, generally addressed to the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal (t).

Where a bill prays the decree of the Court, touching rights What it must claimed by the person exhibiting it in opposition to rights claimed contain. by the person against whom it is exhibited, it must contain a

⁽p) Ord. in Ch. Edit. Beames, 165. (q) Emerson v. Dallison, 1 Ch. R. 194.

⁽r) 3 Bl. Com. 442. s) Ibid. Gilb. For. Rom. 44.

⁽t) Cowp. Ch. Pl. 3.

⁽¹⁾ See the 26th and 27th of the Equity Rules of the Supreme Court of the United States, January Term, 1842. Stated in note to Story Eq. Pl. § 266; Hood v. Irwan, 4 John. Ch. 437.

⁽²⁾ Story Eq. Pl. § 47, 48 and note § 266, 267 and notes.

Parts of a Bill. statement showing the rights of the plaintiff or person exhibiting the bill, by whom and in what manner he is injured, or in what he wants the assistance of the Court; and a prayer for relief suitable to his case, and for that purpose that the process of the Court may issue to bring before it the parties complained of This statement and prayer form the substance and essence of every bill; but, in ordinary bills, other parts have been introduced in practice which, although of a more formal nature, are, nevertheless, necessary to the constitution of a well-drawn bill. parts will form the subject of a future section; but, before entering into the consideration of the form of a bill, the reader's attention should first be drawn to certain general rules and principles

Formal parts.

Must show plaintiff's right.

In the first place, it is to be observed that every bill must show clearly that the plaintiff has a right to the thing domanded, or such an interest in the subject-matter as gives him a right to institute a suit concerning it (u) (1).

by which persons framing bills ought to be guided in the perform-

It would be foreign to the purpose of this work to attempt the enumeration of the various cases in which bills have been dismissed, because filed by parties having no interest in the subject-matter, or no right to institute proceedings concerning it: to do so, indeed, would necessarily lead to the consideration of the general principles of Equity, and would be more fitting for a treatise upon the equitable jurisdiction of the Court than for a book upon its practice. All that need now be said upon this subject is, that if it is not shown by the bill that the party suing has an interest in the subject-matter, and a proper title to institute a suit concerning it, the defendant may demur (x) (2); thus where a plaintiff claims

Omission to show plaintiff's right ground of demurrer.

(u) Lord Red. 154.

ance of their task.

(z) Lord Red. 154.

(2) Story Eq. Pl. § 508, 509, 260, 261.

(1) Story Eq. Pl. § 23.

The Courts of Massachusetts, not having a general jurisdiction in Equity, it is always necessary for a plaintiff to make it appear affirmatively on the face of his bill, that his case is within the jurisdiction of the Court. May v. Parker, 12 Pick. 34.

In all bills in Equity in the Courts of the United States, the citizenship should appear on the face of the bill to entitle the Court to take jurisdiction; otherwise the bill will be dismissed. Dodge v. Perkins, 4. Mason, 435; Story Eq. Pl. 26, note; Bingham v. Cabot, 3 Dall. 382; Jackson v. Ashton, 8 Peters, 148; Story Eq. Pl. § 492. See Louisville and R. R. Co. v. Statson, 2 Howard, S. C. 497.

It is a fundamental rule in all cases of bills in Equity, that they must state a case within the appropriate jurisdiction of a Court of Equity. Story Eq. Pl. § 10, 34.

under a will, and it appears upon the construction of the instru- Parts of a Bill ment, that he has no title, a demurrer will be allowed (*). Brownsword v. Edwards (z) which is the case referred to in Lord Redesdale, in support of the above proposition, Lord Hardwicke is reported to have said that, if, upon arguing the demurrer, the Court had not been satisfied, and had therefore been desirous that the matter should be more fully debated at a deliberate hearing, the demurrer would have been overruled without prejudice to the defendant's insisting on the same matter by way of answer; but, in a note to his treatise (a), Lord Redesdale observes, that "perhaps this declaration fell from the Court rather incautiously: as a dry question upon the construction of a will may be as deliberately determined upon argument of a demurrer, as upon the hearing of a cause in the ordinary course, and the difference in expense to the parties may be considerable." Of the truth of this observation there can be no doubt; and it is much to be wished that, in cases of this description, where the right of the plaintiff in the subject-matter of the suit depends upon a simple point, such as that of the construction of a will, the practice of demurring to the bill were more frequently resorted to, as by such means the great expenses attendant upon many causes, especially testamentary causes, might frequently be saved to the parties; since it often occurs in practice that, owing to the plaintiff's case not having been met in the first instance by a demurrer, and to the rule of the Court not to decide upon questions of this nature till it is satisfied that all persons interested in the discussion have been brought before it, the parties, or at least the testator's estate, are put to great expense for the purpose of submitting the matter properly to the Court; when, ultimately, if it appears that the party filing the bill is not right in the construction he puts upon the instrument, the bill must be dismissed; which, if the plaintiff's bill had been demurred to in the first instance, would have been the result, without the great aditional increase of expense caused by the other proceeding.

The rule, which requires a plaintiff to show by his bill an inter- Rule not conest in the subject-matter of the suit, applies not to one plaintiff fined to one only, but to all the plaintiffs; and if several persons join in filing a bill, and it appears that one of them has no interest, the bill will be open to demurrer, though it appear that all the other plaintiffs

⁽y) Beech v. Crull, Prec. Ch. 588,2 Bro. P. C. 468, S. C.

⁽z) 2 Ves. 243, 248. (a) Lord Red. 154.

Must show Plaintiff's right.

Interest must be existing.

have an interest in the matter, and a right to institute a suit concerning it (b) (1).

The plaintiffs in a suit must not only show an interest in the subject-matter, but it must be an actual existing interest; a mere possibility, or even probability, of a future title will not be sufficient to sustain a bill (c); therefore, where a plaintiff claiming as a devisee in the will of a person who was living, but a lunatic, brought a bill to perpetuate the testimony of witnesses to the will, against the presumptive heir at law (d), and where persons who would have been entitled to the personal estate of a lunatic, if he had been then dead intestate, as his next of kin, supposing him legitimate, brought a bill in the lifetime of the lunatic to perpetuate the testimony of witnesses to his legitimacy, against the Attorney-general, as supposing the rights of the Crown (e), demurrers were allowed. For the parties in these cases had no interest which could be the subject of a suit; they sustained no character under which they could afterwards sue, and therefore the depositions, if taken, would have been wholly nugatory (2). Upon the same principle it has been held that a bill cannot be sustained by a purchaser from a contingent remainder-man of his interest in the property, against a tenant for life, for inspection of title-deeds, &c., although a bill would lie for that purpose by a person entitled to a vested remainder (f).

A bill filed by a person who filled the character of tenant in tail in remainder and his children, to perpetuate testimony to the marriage of the tenant in tail, could not be supported, because the father, being confessedly tenant in tail in remainder, could have no interest whatever in proving the fact of his own marriage, the remainder in tail being vested in him, and the other plaintiffs (the children) were neither tenants in tail nor remainder-men in tail, but the issue of a person who was de facto and de jure tenant in remainder in tail, leaving the whole interest in him, and conse-

(b) The Mayor and Aldermen of Colchester v. —, 1 P. Wms. 595; Troughton v. Getley, 1 Dick. 382; Cuff v. Platell, 4 Russ. 242; Makepeace v. Haythorne, ib. 244; King of Spain v. Machado, ib. 225; Delondre v. Shaw, 2 Sim. 237; Page v. Townsend, 5 Sim. 395.

(c) Lord Red. 157.

(f) Noel v. Ward, 1 Mad. 323.

⁽d) Sackvill v. Ayleworth, 1 Vern. 105; Ex. Ca. Ab. 234, Pl. 3, vide etiam, 2 Prax. Alm. 500, where there is a form of demurrer.

⁽e) Smith v. Attorney-general, Lt. Red. 157, 1 Vern. 105; ed. Raithby, notis cited, 6 Ves. 255.

⁽¹⁾ Story Eq. Pl. § 509, 541, 544; Clarkson v. De Peyster, 3 Paige, 336; ante, 291 and notes.

⁽²⁾ Story Eq. Pl. § 301 and cases cited; 2 Story Eq. Jur. § 1511; Dursley v. Berkley, 6 Sumner's Vesey, 251 and notes.

quently the children had no interest in them, in respect of which Interest must they could maintain their bill (g). Upon the same principle, where the dignity of Earl was entailed upon an individual who died, leaving two sons, the eldest of whom inherited the dignity, upon a bill filed by his eldest son, in his lifetime, against the second son of the first Earl and the Attorney-general, to perpetuate testimony as to his father's marriage, a demurrer was allowed (h).

Where, however, a party has an interest, "it is perfectly immaterial how minute such interest may be, or how distant the possibility of the possession of that minute interest, if it is a present interest (1). A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is, nevertheless, a present estate; and as in the case upon Lord Berkeley's will (i), though the interest may, with reference to the chance, be worth nothing, yet it is in contemplation of law an estate and interest, upon which a bill may be supported (k)."

But although a plaintiff may have a present estate or interest, Not capable of yet if his interest is such that it may be barred or defeated by the being defeated. act of the defendant, he cannot support a bill, as in the case put by Lord Eldon in Lord Dursley v. Fitzhardinge (1), of a remainder-man filing a bill to perpetuate testimony against a tenant in tail. To such a bill it seems the tenant in tail might demur, upon the ground that he may at any time suffer a recovery, which would destroy the remainder, and deprive the plaintiff of his interest (2).

A plaintiff must not only show in his bill an interest in the sub- Title must be ject-matter of the suit, but he must also make it appear that he has proper. a proper title to institute a suit concerning it (m); for it very often happens that a person may have an interest in the subject-matter, and yet, for want of compliance with some requisite forms, he may not be entitled to institute a suit relating to it. Thus, for in- Executor must stance, the executor of a deceased person has an interest in all the state will personal property of his testator; but, till he has proved the will, he has no right to assert his right in a Court of justice. If, there-

⁽g) Allan v. Allan, 15 Ves. 130.
(h) Earl of Belfast v. Chichester, 2 J. & W. 439.

⁽i) Lord Dursley v. Fitzhardinge, 6 Ves. 251.

⁽k) Per Lord Eldon, in Allan v. Allan, 15 Ves. 136, [2 Story Eq. Jur. § 1511]. (l) 6 Ves. 262.

⁽m) Lord Red. 155.

⁽¹⁾ Story Eq. Pl. § 301.

⁽²⁾ It would be a fruitless exercise of power to entertain a bill to perpetuate evidence in such a case. Story Eq. Pl. § 301.

Interest must be existing. in proper Court.

fore, a man files a bill as executor, and does not state in it that he has proved the will in the proper Court, the bill will be liable to demurrer (n) (1). It is sufficient, however, to allege in the bill that the plaintiff has proved the will in the proper Court, without mentioning the Court in which it was proved (o). It is said "that Lord Keeper North, when first he came into the Court of Chancery, was of opinion that a plaintiff administrator ought to show by his bill where he had taken out administration, to the intent that the defendant might be informed in what Court to look for it, as it might be void, if taken out under a wrong jurisdiction; but that, of late, the general allegation of having taken out administration has been held good, and was so determined by Lord King, in the case of Stone v. Baker (p)."

If executor state wrong Court, bill liable to demurrer.

With reference to this point it is to be observed, that if a plaintiff takes upon himself to state upon his bill the Court in which he has proved the will, or taken out administration, and it appears to have been an improper or insufficient Court, he will not show a complete title to sue, and a demurrer will hold (q). Thus, where the plaintiffs sued upon administrations obtained in the Spiritual Court at Paris, a demurrer was allowed by Lord Hardwicke, because the Court here can take no notice of what is done in the Spiritual Courts beyond sea (r) (2). And so, in a suit by an executor, where a testator has bona notabilia in divers dioceses, and the bill shows that the will has been proved in one of those dioceses, the plaintiff's title will not be complete, because the proof ought to have been in the Archbishop's Court (s). From a case, as it stands reported, it appears that Sir J. Leach, M. R., was of opinion that the probate of a will in a subordinate jurisdiction, even where there were no bona notabilia, would not be sufficient to entitle the executor of a deceased creditor to a decree for an account of his debtor's estate; and the executor must, before the decree is pronounced, be armed with a prerogative probate (t). In that case, however, his Honor appears to have proceeded on a mistaken view of the rule, that the Accountant-general cannot pay money out of Court without a prerogative probate (w).

Prerogative probate unnecessary if no bona notabilia.

⁽n) Humphreys v. Ingledon, 1 P. Wms. 752. (s) Comber's case, 1 P. Wms. 767. (t) Young v. Elworthy, 1 M. & K. (o) Ibid. 215. (u) Challnor v. Murhall, 6 Ves. 118; Newman v. Hodgson, 7 Ves. (p) 13 Dec. 1732, ibid. n. Lord Red. 155.

Tourton v. Flower, 2 P. Wms. 409; Thomas v. Davies, 12 Ves. 417.

Story Eq. Pl. 625. (2) Story Eq. Pl. § 787.

is applicable only to cases where there is money already in Court, Plaintiff must and the party entitled to that money dies before he receives it; in such cases, the Court requires a prerogative probate, and will not direct the money to be paid out on a diocesan probate, because already in the fund itself being in Court at the same time that the death of Court. the party took place in a country diocese, shows that there are bona notabilia in divers dioceses, and consequently, that a prerogative is the competent probate (x); but where a party entititled to relief as the executor or administrator of a person who died in a particular diocese, without leaving bona notabilia in different dioceses, claims under a probate or administration granted in the particular diocese, and in the course of the cause the fund in question is brought into the Court, it would be extremely unreasonable to require that, in order to entitle himself to get the money out of Court, he should take out a fresh probate or letters of administration in the Prerogative Court (y). Payment into Court is a precautionary measure, and does not affect the rights and interests of any of the parties litigating; therefore, if a plaintiff, at the time he files his bill, has a proper title to maintain the suit, the mere fact of the money being brought into Court for its better security, ought not to alter that title and render it necessary for him to seek a new one (z). This view of the case was adopted by Lord Cottenham, upon a motion made before him for the discharge of a prisoner in custody for a contempt, in not obeying a decree by which he was ordered to pay money into Court. One of the grounds of the application for his discharge was that, on the death of one of the plaintiffs, the proceedings had been improperly revived at the instance of a plaintiff who had taken out administration in the province of York, and his Lordship expressed his opinion to be that when there are no bona notabilia at the death of a testator or intestate, probate or administration by the Provin-

show proper

(x) Per Sir J. Nicholl, in Scarth v. Bishop of London, 1 Hag. 625, 636; Jones v. Howell, 2 H. 342.

(y) It seems from the above case of Scarth v. The Bishop of London, ) It seems from the above case that, when money is in the public funds, and the party dies out of Eng-land, the Archbishop of Canterbury and Bishop of London have a concurrent jurisdiction to grant probate; and that, although when a party dies within a diocesan jurisdiction, without bona notabilia, the Prerogative Court will not usually grant probate; yet, in order to aid the ends of justice, it will, if necessary, grant an additional probate, limited to the recovery of the property sought. Vide Yockney v. Foyster, 1 Hag. 631, n.; and Sir John Nicholl's observations upon the same case, ib. page 636.

(2) Npon the above case of Young v. Elworthy being cited before Lord Brougham, Mr. Colville, the Registrar, stated that Sir J. Leach, M. R., had subsequently changed his opin-ion upon the point, and directed the decree to be drawn up; and this statement was acted upon by his Lord-ship, who observed that the distinction was obvious; MSS. 10 Nov. 1834.

show proper Title.

Plaintiff must cial Court is sufficient to entitle a plaintiff to maintain his suit (a). The same opinion had been expressed, a few days before, by Lord Langdale, M. R., upon the hearing of a demurrer to another bill of revivor in the same suit. The original bill had been filed, for the purpose of redeeming a mortgage of an estate in Yorkshire, by parties claiming under a devise by the mortgagor, by which it had been directed to be converted into personal estate for payment It appeared, in the course of the proceedings, that the defendants were mortgagees in possession, over-paid, and that a considerable sum was due from them for rents and profits received after the mortgage had been paid off, which, by the decree on further directions, they had been ordered to pay into Court. Upon the death of one of the plaintiffs to the suit, a bill of revivor was filed by the surviving plaintiffs and by the administrator of the deceased plaintiff, claiming under a probate from the Prerogative Court of York, to which bill a demurrer was filed, one of the grounds of demurrer being that there ought to have been an administration either from the Prerogative Court of Canterbury or from the Diocesan Court of London, and the above case of Young v. Elworthy was cited in support of the demurrer; but the Master of the Rolls expressed himself to be of opinion that, at all events, for the purpose of filing the bill of revivor, (there being then no money in Court,) the York administration was sufficient, and overruled the demurrer (b) (1).

Derivative executor need not have prerogative probate, though original executor had.

With reference to the above point, it is to be observed that, in order to complete the title of a plaintiff as a derivative executor, it is not necessary that the will of the original testator and that of his executor should be proved in the same Court (c); and where the will of the original testator had been proved in the Prerogative Court by two of his executors, both of whom died, and the executors of the survivor, upon the death of their testator, as he had not bona notabilia, proved the will in the Consistory Court of Llandaff, Sir J. Leach, M. R., upon a question being raised whether the representation to the original testator was complete, directed that the case should stand over, in order that the opinion of a civilian might be taken, and that inquiry might be made as to the practice and doctrine of the Ecclesiastical Courts on the subject.

(b) Metcalfe v. Metcalfe, 1 Keen, 299-309.

⁽a) Wilson v. Metcalfe, 11 March, 74; see however, Jernegan v. Baxter, 5 Sim. 568. 1836, MSS.; and see Beadler v. Burch, 10 Sim. 332. (c) Wankford v. Wankford, I Salk.

⁽¹⁾ See Story Eq. Pl. §. 624.

A case was accordingly submitted to Dr. Lushington, who ex- Plaintiff must pressed his opinion to be that the executors of the surviving executor had not clothed themselves with the legal character of personal representatives of the original testator, admitting however that there was no express authority upon the question. Master of the Rolls, nevertheless, was inclined to think that the chain of representation was complete; and, on a subsequent day, his Honor decreed accordingly (d).

If an executor, before probate, file a bill, alleging that he has Executor may proved the will in a proper Ecclesiastical Court, such allegation probate; will obviate a demurrer (e); he must, however, prove the will before the hearing of the cause, and then the probate will be suffi-but must prove cient to support the bill, although it bear date subsequently to the before hearing. filing of it (f). In this respect, Courts of Equity differ from Courts of Law; for at Law an executor cannot maintin actions before probate, unless such as are founded on actual possession; because, in actions where he sues in his representative character, he is bound, when he declares, to make profert of the letters testamentary (1); otherwise the defendant may demur (g) (2). The same distinction also prevails between the practice of Courts of Law and Courts of Equity with respect to administrators; for in Equity a plaintiff may file a bill as administrator before he has Same rule aptaken out letters of administration, and it will be sufficient to have plies to administrators: them at the hearing (h), which is not the case at Law (3).

It is to be observed that, although an executor or administrator may, before probate or administration granted, file a bill relating but probate or administration to the property of the deceased, and such bill will not on that acmust be stated count be the subject of demurrer, provided the granting of probate in bill. or of letters of administration, by the proper Ecclesiastical Court, be alleged in the bill, yet a defendant may take advantage of the

 ⁽g) Comber's case, 1 P. Wms. 758.
 (h) Fell v. Lutwidge, Barnard, (d) Fowler v. Richards, 5 Russ. 39. (e) Humphreys v. Ingledon, 1 P. 320; Humphreys v. Humphreys, 3 (f) Humphreys v. Humphreys, 3 P. Wms. 350. P. Wms. 349.

⁽¹⁾ In Axers v. Musselman, 2 Browne, 115, it was held, that in a suit by an executor for a cause of action arising in the testator's life time, the plaintiff need not make profert of the letters testamentary.

A declaration by an administrator need not make profert of letters of administration, or set forth when or by what authority administration was granted. Langdon v. Potter, 11 Mass. 313. See Savage v. Meriam, 1 Blackf.

⁽²⁾ In Call v. Ewing, 1 Blackf. 301, it was held that executors must take out letters testamentary, before the filing of their declaration.

(3) See Langdon v. Potter, 11 Mass. 313, cited in note ante, to page 306.

Show proper Title. Defendants may plead fact granted.

Plaintiff must fact not being as stated in the bill, by plea; thus in Simons v. Milman (i), where letters of administration had been granted to the defendant under the idea that the deceased had died intestate, whereas, in fact, he had made a will and appointed the plaintiff that no probate his executor, who before probate filed a bill, for the purpose of recovering part of the assets of the testator from the defendant, alleging that probate of the will had been granted to him, to which bill the defendant put in a plea stating that such was not fact; Sir A. Hart, V. C., allowed the plea (1). At Law, however, it seems, that a defendant cannot plead, to an action brought by an executor, that the plaintiff has not proved the will, though he may demur if the plaintiff does not, in his declaration, show the pro-The reason of this is, that the right of the executor is derived from the will and not from the probate, which only completes the incipient title. With respect to an administrator, however, it is different; for the administrator receives his right entirely from the administration (1).

Executor filing bill before probate, must state it as taken out.

Secus, in bill against executor.

But although an executor filing a bill before probate, must, as we have seen, allege in it that he has proved the will in the proper Ecclesiastical Court, it is not necessary that in a bill against an executor such a statement should be made; for if executors elect to act they are liable to be sued before probate, and cannot afterwards renounce (m). It also seems that if a party entitled by law to take out administration to a deceased person, does not so, but acts as if he were administrator, and receives and disposes of the property, he will be liable to account as administrator, and it will not be necessary to have any other party before the Court. Thus, in Cleland v. Cleland (n), an objection for want of parties, on the ground that an administrator was not before the Court, was overruled, because the widow of the deceased, who was entitled to the administration, and who had possessed herself of the personal estate and disposed of it, was a party, though she denied by her answer that she had taken out administration, which, by the bill, she was alleged to have done (2).

It may be here observed, that if it appears to the Court that the probate, or the letters of administration, bear a stamp applicable to a less sum than that which is sought to be recovered in the cause,

⁽m) Blewitt v. Blewitt, 1 Younge, 543. (i) 2 Sim. 241. (k) Comber's case, 1 P. Wms. 768.

⁽n) Prec. Ch. 64. (l) Ibid.

Story Eq. Pl. § 727. (2) See Story Eq. Pl. § 91.

no decree can be obtained until the defect has been rectified, and Plaintiff must the party can show that he represents the estate to an amount sufficient to cover his claim (o); though, if the fact that the plaintiff be administrator or executor is admitted, the objection can scarcely arise (p).

Title.

Where it appears that, in order to complete the plaintiff's title All preliminto the subject of the suit or to the relief he seeks, some prelimi- sary to comnary act is necessary to be done, the performance of such prelim- plete his title inary act ought to be averred upon the bill, and the mere allega- must be avertion that the title is complete, without such averment, will not be sufficient; thus where a plaintiff claimed as a shareholder by purchase, of certain shares in a Joint-Stock Company or Association; alleging in his bill that he had purchased such shares for a valuable consideration, and had ever since held the same; but it appeared in another part of the bill, that, by the rules of the company or association, no transfer of shares could be valid in Law or Equity unless the purchaser was approved by a board of directors, and signed an instrument binding him to observe the regulations, Lord Brougham allowed a demurrer, on the ground that the performance of the rule above pointed out was a condition precedent, and ought to have been averred upon the bill, and that the allegation of the plaintiff having purchased the shares and being a shareholder, although admitted by the demurrer, was not sufficient to cure the defect (q) (1).

In pleadings at Common Law, it is held that, in stating a deriva- Of showing tive title, a party claiming by inheritance, must show how he is derivative heir. viz. as son or otherwise; and, if he claims by mediate and Plaintiff must and not immediate descent, he must show the pedigree (r); for show how he example, if he claims as nephew, he must show how he is nephew. is heir.

As to setting It appears to be right, upon every principle, that the same rule out pedigree. should be observed in bills in Equity; and, in Lord Digby v. Meech (s), where the object of the bill was to establish the plaintiff's right to a manor, and to certain fines and fees; the title, as set forth by the bill, was, that King James I. granted the premises to Sir John Digby, afterwards Earl of Bristol; from him they descended to George; from him to John, Earl of Bristol; and, on kis

⁽o) Jones v. Howells, 2 H. 342; Cleugh v. Dixon, 10 Sim. 564; Nail v. Punter, 5 Sim. 563; Hunt v. Stevens, 3 Taunt. 113; Rogers v. James, 7 Taunt. 147.

⁽p) See Thynne v. Protheroe, 2

M. & S. 553. (q) Walburn v. Ingilby, 1 M. & K. 61.

⁽r) Steph. on Pleadings, 340.(s) Bunb. 195.

⁽¹⁾ Story Eq. Pl. § 267, 257 a, 258.

Derivative Title.

Of showing a death, vested in the now plaintiff; and it was objected at the hearing that there was not a sufficient title set forth, it not appearing how the premises vested in the plaintiff, whether by descent, settlement, or otherwise; and the whole Court agreed that the bill ought, for this reason, to be dismissed, the bill being to establish a right, as well as for an account: upon this ground the cause stood over, but with liberty for the plaintiff to amend his bill. The decision of Lord Thurlow in Delorne v. Hollingsworth (s), appears, however, to throw some doubt as to the necessity of setting out in a bill the manner in which the plaintfif makes out his In that case the plaintiff, who claimed to be entitled to certain premises as heir at law of an ancestor, and prayed a discovery of the defendant's title, and an account, &c., did not by the bill set out her pedigree fully, but stated that one person through whom she made title had three sons, and that she claimed under the second son, without alleging that the first son died without issue; to this bill the defendant demurred, "because the plaintiff had not sufficienly stated the pedigree by which she made title," and the demurrer was overruled. In pronouncing his judgment, Lord Thurlow said, "If this demurrer were to be allowed, it would only drive the plaintiff to supply the pedigree in another bill, and thus I do not see the propriety of trying the main question, and cutting short the cause in this stage of it, unless a special case had been made out, by which it appeared that some great length of proceedings, or some great expense, would be saved by it. The whole question is, whether the allegation in the bill, of the plaintiff being heir, is not sufficient to entitle her to go on in the suit; and, in general, I see no reason why it should not (t)." It is, however, to be observed, that the plaintiff had in fact partly stated her pedigree; and that the defect arose from the circumstance of her omitting to state the death of a party without issue, whose death, under such circumstances, was necessary to entitle the person, under whom the plaintiff claimed; but that the defect was supplied by the averment that she claimed under that person, which she could not have done, if the other had not died without issue; so that, in fact, there was an averment, sufficient in substance, on the face of the bill, to obviate a demurrer on the ground taken, namely, that the pedigree was not sufficiently set out.

Where plaintiff claims by tract,

Where there is a privity existing between the plaintiff and defendant, independently of the plaintiff's title, which gives the privity or con-plaintiff a right to maintain his suit, then it is not necessary to state the plaintiff's title fully in the bill; thus where a plaintiff's

claim against the defendant arises under a deed or other instru- Of showing a ment, executed by the defendant himself, or by those under whom he claims, which recites, or is necessarily founded upon, the existence, in the right which he asserts, it is sufficient to allege the execution of the deed by the parties. Thus in the case of a bill, in suits beby a mortgagor in fee, against a mortgagee, to redeem the mort-tween mortgagage, it is sufficient merely to state the mortgage-deed, without gagee. alleging that the mortgagor was seised in fee, &c., because the defendant having executed the deed which proceeds upon that supposition, amounts in effect to an acknowledgment of that fact, which he cannot afterwards be admitted to dispute; and so if the mortgagor has only a derivative title, it is not necessary to show the commencement of such derivative title, or its continuance, because the right of the plaintiff to redeem, as against the defendant, does not depend upon the title under which he claims, but upon the proviso for redemption in the mortgage-deed. Upon between lessor the same principle, where a defendant holds under a lease from and lessee. the plaintiff, the plaintiff need not set out his title to the reversion, the fact of the defendant having accepted a lease from the plaintiff being sufficient to preclude his disputing the title under which he holds (u). In like manner, where a man employs another as Principal and his bailiff or agent, to receive his rents or tithes, the right to call agent. upon the bailiff or agent for an account does not depend upon the title of employer to the rents or tithes, but to the privity existing between him and his bailiff or agent; the employer may therefore maintain a bill for an account, without showing any title to the rents or tithes in question.

Where, however, the plaintiff's right does not depend upon any Where claim particular privity between him and the defendant existing inde-depends only on title, it pendently of his general title to the thing claimed, there it will be must be stated. necessary to show his title in the bill. Thus, where a bill is filed In bills by by the lessee of a lay impropriator against an occupier, for an lessee for tithes. account of tithes, there the right of the plaintiff to the account depends solely upon his title; he must, therefore, deduce his title regularly, and show not only the existence of the lease, but that the person from whom it is derived had the fee (x).

The same precision in showing an interest, which is required in Of stating setting out the case of a plaintiff, is not requisite in stating that defendant.

⁽a) If the Plaintiff claims as heir, or under a derivative title from the mortgagor or lessor, he must, as in

other cases, show how he makes out his title.

⁽x) Penny v. Hoper, Bunb. 115; vide Burwell v. Coates, ibid. 129.

Of stating Case against Defendant.

of the defendant against whom the relief is sought (1), because a plaintiff cannot always be supposed to be cognizant of the nature of a defendant's interest, and the bill must frequently proceed with a view to obtain a discovery of it; thus, where a bill was filed, by a lessee for years, for a partition, and the plaintiff, after stating his own right, to one undivided tenth part, with precision, alleged that the defendant was seized in fee simple of, or otherwise well entitled to, seven other tenth parts, a demurrer, on the ground that the plaintiff had not set out the defendant's title with sufficient certainty, was overruled (y). And even where it is evident, from the nature of the case, that a plaintiff must be cognizant of a defendant's title, and sets out the same informally, yet, if he alleges enough to show that the defendant has an interest, it will be Thus, where a bill was filed to redeem a mortgage, sufficient. but the conveyance was so stated that it did not show that any legal estate had passed to the defendant, a demurrer was overruled because the defendant could not be permitted to dispute his own title, which was admitted by the plaintiff to be good (z). In all cases, however, a bill must show that a defendant is in

Plaintiff must show defendant has interest.

some way liable to the plaintiff's demand (a), or that he has some interest in the subject of the suit (b) (2), otherwise it will be lis-Thus, where a bill was brought upon a ground ble to demurrer. of equity, by the obligee, in a bond against the heir of the obligor, alleging that the heir having assets by descent ought to satisfy the bond, a demurrer was allowed because the bill did not expressly charge that the heir was bound in the bond, although it did state that the heir ought to pay the debt (c) (3); so where a bill was brought against an assignee touching a breach of covenant in a lease, and the covenant, as stated in the bill, appeared to be collateral, and not running with the land, did not, therefore, bind assignees, and was not stated by the bill expressly to bind assignees, a demurrer by the assignee was allowed (d) (4). here it may be observed that, although it is generally necessary to show that the plaintiff has some claim against a defendant, or

Exception in case of members or officers of corporation.

that a defendant has an interest in the subject-matter in litigation,

yet there are cases in which a bill may be sustained against de-(c) Crosseing v. Homor, 1 Vern. 180. (y) Baring v. Nash, 1 V. & B. 551. (z) Roberts v. Clayton, 3 Anst. 715.

⁽a) Lord Red. 163. (b) Ibid. 160.

⁽d) Lord Uxbridge v. Staveland, 1 Ves. 56, 394.

Story Eq. Pl. § 255.
 Story Eq. Pl. § 262 et seq.
 Story Eq. Pl. § 257.
 Story Eq. Pl. § 255, 256, 257.

fendants who have no interest in the subject, and who are not in any manner liable to the demands of the plaintiff. The cases alluded to are those, which have been before referred to, of the members or officers of a corporation aggregate, who, as we have seen, may be made parties to a suit against the corporation for the purposes of discovery (1). With respect to the other persons who are generally included amongst the exceptions to the rule, that no persons who have not an interest, or against whom a decree cannot be pronounced can be made parties to a suit, (such as arbitrators, attornies or agents,) it will be seen, upon reference to what In case of athas been before stated upon this subject (e), that the right to tornies or make them parties is confined to cases where relief is, in fact, prayed against them, viz., where they are implicated in fraud or collusion, and it is specifically asked that they may pay the costs; or where they are the holders of a particular instrument which the plaintiff is entitled to have delivered up (f).

Of stating Case against Defendant.

A bill must not only show that the defendant is liable to the plaintiff's demands, or has some interest in the subject-matter, but it must also show that there is such a privity between him and the plaintiff as gives the plaintiff a right to sue him (g) (2), for it is frequently the case that a plaintiff has an interest in the subject-matter of the suit which may be in the hands of a defendant, and yet, for want of a proper privity between them, the plaintiff may not be the person entitled to call upon the defendant to answer his demand. Legatee or Thus, though an unsatisfied legatee has an interest in the estate of creditor canhis testator, and a right to have it applied in a due course of admin- to testator's esistration, yet he has no right to institute a suit against the debtors tate. to his testator's estate for the purpose of compelling them to pay their debts in satisfaction of his legacy (h). For there is no privity between the legatee, and the debtors, who are answerable only to the personal representative of the testator. Upon the same principle, where a bill was filed by the creditors of a person who was one of the residuary legatees of a testator against the personal representative for an account of his personal estate, it was held

(h) Bickly v. Doddington, Lord Red. 159, n.; Monk v. Pomfret, ib.

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⁽e) Ante, p. 343.(f) Vide ante, 346.(g) Lord Red. 159.

⁽¹⁾ Ante, 180 and note, 342, 343; Fenton v. Hughes, 7 Sumner's Vesey,

^{287,} and Perkins's note (a), and cases cited to this point.

(2) Story Eq. Pl. § 227, 178, 514; Long v. Majestre, 1 John. Ch. 305; Elmslie v. M'Aulay, 3 Bro. C. C. (Perkins's ed.) 624, note (1), 627, note (a), and cases cited; Eden on Injunctions, (2nd Am. ed.) 354, and cases in note (a).

Of stating Case against Defendant.

Bankrupt creditor cannot sue executor of debtor.

to be impossible to maintain such a bill (i). And so where z creditor of a testator, who had previously been a bankrupt, and had obtained his certificate, brought a bill against the executor for an account, &c., and made the assignees under the testator's bankruptcy parties for the purpose of compelling them to account to the executor for the surplus of the bankrupt's estate, a demurrer by the assignees was allowed (k).

Exception in

It is to be observed, however, that, in cases of collusion becases of fraud, tween the debtor and the executor, or of the insolvency of the executor, bills by creditors or residuary legatees against debtors to a testator's estate will be entertained (1) (1) and it seems also that where persons other than the personal representative of the testator have possessed specific assets of the testator, such persons may be made parties to a suit by a creditor (m) (2). So also, where it is desirable to have the account of the personal estate entire, a creditor may make the surviving partner of a deceased debtor a defendant to his bill, though no fraud or collusion is alleged (n) And it seems that a joint creditor may maintain a suit against the representatives of a deceased partner for satisfaction of his entire demand out of the assets, although the surviving partner is not alleged to be insolvent and is made a party to the bill (0) (2). In Bowsher v. Watkins (p), it was determined that

In cases of partnership.

> (i) Elmslie v. M'Aulay, 3 Bro. 224, [Perkins's ed. note (1) and p. 627,

> note (a) and cases cited].
>
> (k) Utterston v. Mair, 4 Bro. C. C. 270, S. C. 2 Ves. J. 95; Beckley v.

Dorrington, cited 6 Ves. 749.
(l) Ibid.; vide etiam, Doran v.
Simpson, 4 Ves. 651, [Sumner's ed.
note (n)]; Alsager v. Rowley, 6 Ves.
749; Troughton v. Binkes, 6 Ves.
573-575 [Sumner's ed. notes]; Benfield v. Solomons, 9 Ves. 86 [Sumper's ed. note, 60] ner's ed. note (a)].

(m) Newland v. Champion, 1 Ves. 106; and see Consett v. Bell, 1 Y. &

C. 569. (n) Ibid; vide etiam, Gedge v.

Traill, 1 Russ. & M. 281, n.
(c) Wilkinson v. Henderson, 1 M. & K. 582.

(p) 2 Russ. & M. 277. With reference to these cases, it may be observed that in Law v. Law, before

Sir J. L. Knight Bruce, V. C. April 24, 1845, it was stated by Mr. Wright, one of the counsel in the case, that he had examined the record of the case of Newland v. Champion, in the Tower, and that in that case there were allegations of collusion between the surviving partner and the admin-istratrix of the deceased partner; whereupon his Honor said, "the doctrine of Lord Hardwicke, in Newland v. Champion, was contrary to his own opinion on that subject, and that he thought that in the report of that case, it had been overstated. The doctrine, however, was so expressly stated in that case, that he should have great difficulty in com-ing to a conclusion on it." The circumstances of the case of Law s. Law, did not require him to decide the point.

^{(1) 1} Mont. Eq. Pl. 45, 46, note (a); 2 Mont. Eq. Pl. 141; Mitf. Eq. Pl. by Jeremy, 158, 159; Story Eq. Pl. § 514 and note, § 227, 178, 232, note; Eden on Injunctions, (2nd Am. ed.) 354 and cases in note (a); Elmslie v. M'Aulay, 3 Bro. C. C. (Perkins's ed.) 627, note (a).

(2) See Story Eq. Pl. § 178, 514, 227.

(3) Story Eq. Pl. § 167, 178.

residuary legatees may sustain a bill for an account against the Must show pri executor and the surviving partners of the testator, though collusion between the executor and the surviving partners is neither charged nor proved.

vity between Plaintiff and Defendant.

It seems that where it is necessary to allege fraud or collusion in cases of this nature, a general allegation of it in the bill will be sufficient to shut out a demurrer, although, in the opinion of Lord Eldon, it would be very convenient to state the facts upon which such allegation is founded, as there is great inconvenience in joining issue upon such a general charge without giving the defendant a hint of any fact from which it is to be inferred (q).

With reference to the subject of privity between the plaintiff Employment and defendant, it is to be observed that the employment of agents of agents or or brokers in a transaction does not interfere with the privity be not destroy tween the principal so as to deprive them of their right to sue each privity. other, immediately. Thus, where a principal transmits goods to a factor, he may sue the party who buys of that factor; and where a bill was brought by some merchants against the defendant to discover what quantity of straw he had purchased of their agents, and for payment to them and not to the agents, a demurrer was overruled (r): and so where a merchant, acting upon a del credere commission, became bankrupt, having sold goods of his principals for which he had not paid them, and, shortly before his bankruptcy, drew bills on the vendees, which he delivered to some of his own creditors in discharge of their demands, they knowing his insolvency, a suit by the principals against the person who had received the bills for an account and payment of the produce was sustained (a) (1).

A bill must not only show that the plaintiff is entitled to or in- Must pray terested in the subject-matter of the litigation, and is clothed with proper relief.

a contract made between his agent and a third person in the name of the agent, for it is treated as a contract merely between the parties named in it, although the agent is known to be acting in that character. United States v. Parmele, 1 Paine, C. C. 252; Clark v. Wilson, 3 Wash. C. C. 560.

⁽q) Benfield v. Solomons, 9 Ves. 87. (u) Newman v. Godfrey, cited Ld. Red, 160, 2 Bro. C. C. 332, S. C.

⁽r) Lissett v. Reave, 2 Atk. 394.

⁽¹⁾ See Story, Agency, § 418 et. seq. 403 et seq.; Lenerick v. Meigs, 1 Cowen, 645, 663, 664, 665; ante, 245, notes; 2 Kent (5th ed.) 629-632. Ordinarily, the principal cannot avail himself by suit in his own name of

There are, however, exceptions to this rule as well established as the rule itself. As in case of a written contract by a factor in his own name for the purchase or sale of goods for his principal. So in case of a policy of insurance procured by an agent in his own name for the benefit of his principal, the agent, as well as the principal, may sue thereon. See Story, Agency, § 160, 161, 162, 418 et seq., § 270, 272; Brewster v. Lunt, 8 Louis. 296.

vity between Plaintiff and Defendant.

Must show pri- such a character as entitles him to maintain the suit, and that the defendant is also liable to the relief sought against him, or is in some manner interested in the dispute, and that there is such a privity between him and the plaintiff as gives the plaintiff a title to sue him, but it must also pray the Court to grant the proper relief suited to the case, as made by the bill (1); and if, for any reason founded on the substance of the case as stated in the bill, the plaintiff is not entitled to the relief he prays, either in the whole or in part, the defendant may demur (x). In some of the most ancient bills, as appears by the records in the Tower, the complainant does not expressly ask any relief nor any process, but prays the Chancellor to send for the defendant and to examine him. In others, where relief is prayed, the prayer of process is various, a corpus cum causa, sometimes a subpæna, and sometimes other writs (y). Afterwards the bill appears to have assumed a more regular form, and not only to have prayed the subpæna of the Court, but also suitable relief adapted to the case contained in the statement, which is the general form of all bills in modern use (2). But although it is the general practice of the present day, in all cases where relief is sought, to specify particularly the nature of such relief; yet it seems that such special prayer is not absolutely necessary, and that praying general relief is sufficient (z) (3); and, in Partridge v. Haycraft (a), Lord Eldon said that he had seen a bill with a simple prayer that the defendant might answer all the matters aforesaid, and then the general prayer for relief.

Prayer for special relief not necessary;

where inserted, must be proper to case made :

Secus, relief not granted under general prayer.

It is to be observed, that, where specific relief is prayed, care must be taken to adapt such relief to the case made by the bill, as, after praying specific relief, a plaintiff cannot, at the hearing, dissent to the relief he has sought, and, under the general prayer, ask relief of another description, unless the facts and circumstances charged by the bill, will, consistently with the rules of the Court, maintain that relief (b) (4).

(b) Per Lord Eldon in Hiern v. Mill, 13 Ves. 114-119, and Soden v. (z) Lord Red. 164. (y) Jud Auth. M. R. 91, 92. (z) Cook v. Martyn, 2 Atk. 3; Soden, cited ib. 119; vide post, sect.

Grimes v. French, ib. 141.
(a) 11 Ves. 570-574.

⁽¹⁾ Story Eq. Pl. § 40, 41, 42. The prayer of a bill in Chancery is an essential part, and without its insertion, no decree can be rendered for a plaintiff. Driver v. Tatner, 5 Porter, 10. See Smith v. Smith, 4 Rand. 95. See also post, § 5, § 8, "The Prayer for Relief," in this chapter.

(2) Story Eq. Pl. § 12.

(3) Post, § 5, § 8, "The Prayer for Relief," in this chapter

(4) See post, "The prayer for Relief," in this chapter, and notes to this

point.

The requisites above set out are necessary in every bill which is filed in a Court of Equity for the purpose of obtaining relief; there are other requisites appertaining to bills adapted to particular purposes, which will be hereafter pointed out, as well as those distinctive properties which belong to bills not filed for the purposes of relief. But besides those points which are generally necessary to be attended to in the frame of all bills, as each case must depend upon its own particular circumstances, matters must be introduced into every bill which will occasion it to differ from others, but which it is impossible to reduce under any general rules, and must be left to the discretion of the draftsman. Care, Every thing to however, must be taken in framing the bill that everything which must be stated. is intended to be proved be stated upon the face of it, otherwise evidence cannot be admitted to prove it (c) (1). This is required in order that the defendant may be aware of what the nature of the case, to be made against him, is. The necessity of observing this rule was strongly insisted on by Lord Chief Baron Richards, in the case of Hall v. Malthy (d). And in Montesquieu v. Sandys (e), the principle upon which it is founded is strongly illustrated. In that case a bill was filed to set aside a contract entered into by an attorney for the purchase of a reversionary interest from his client, on the ground of fraud and misrepresentation; the evidence adduced in support of the allegation of fraud, &c., did not, in Lord Eldon's opinion, substantiate the case as laid in the bill: a transaction however was disclosed in the evidence which his Lordship appeared to think would have raised a question of considerable importance in favor of the plaintiff if it had been properly represented upon the pleadings; but as it had not been stated in the bill, he thought it would be far too much to give relief upon circumstances which were alleged upon the record (2).

Prayer for Relief.

It is to be observed in this place, that not only will it be impos- Inquiry not sible to introduce evidence as to facts which are not put in issue directed unless by the bill, but that even an inquiry will not be directed before it in pleadings. the Master unless ground for inquiry is laid in the pleadings (f).

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(c) Gordon v. Gordon, 3 Swan.
                                  v. Mansfield, 6 Sim. 565.
                                   (f) Holloway v. Millard, 1 Mad.
  (d) 6 Price, 240-259.
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(s) 18 Ves. 302; vide etiam, Powys

(2) No facts are properly in issue, unless charged in the bill; and of

⁽¹⁾ But the plaintiff need not, and indeed should not, state in the bill any matters of which the Court is bound judicially to take notice, or is supposed to possess full knowledge. Many of these matters are enumerated by Mr. Justice Story in Story Eq. Pl. § 24. So also by Mr. Greenleaf, in his work on Evidence, 1 vol. § 4, 5, 6.

be Proved

Everything to Thus, where a bill was filed for foreclosure, and a motion was must be Stated made for a reference to the Master, under the 7th Geo. II. c. 20. to inquire into the amount due upon the mortgage, and it was insisted that the Master ought to be directed to take an account of the costs incurred by the plaintiff in certain proceedings in an ejectment at Law which were not alluded to in the bill, the Court held that no such inquiry could be directed, but gave the plaintiff leave to amend his bill in that respect (g).

Bill must be for adequate value.

It is right here to observe that, independently of the qualities which have been above pointed out as necessary to bills in general, it is requisite that the object for which a bill is brought should not be beneath the dignity of the Court; for the Court of Chancery will not entertain a suit where the subject-matter of the litigation is under the value of 10l. (1); except in cases of charities (A), or of fraud (i), or of bills to establish a right, as in the case of 6s. claimed to be due as an Easter offering (k). It is said that the Court will not entertain a bill for land under the yearly value of

(g) Millard v. Magor, 3 Mad. 433.
 (k) Anon. 1 Eq. Ca. Ab. 75, Mar-

(i) Bunb. 17.

(k) 4 Bro. P. C. 314.

gin.

course no proofs can generally be offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence; for the Court pronounces its decision secundem allegata et probata. Story Eq. Pl. § 257; Crocket v. Lee, 7 Wheaton, 522; Jackson v. Ashton, 11 Peters, 229; James v. McKernon, 6 John. 564.

(1) The true ground of this rule is, that the entertainment of suits of small value has a tendency, not only to promote expensive and mischievous litigacontroversies, to the manifest injury of other suitors, and to the subversion of the public policy of the land. Moore v. Lyttle, 4 John. Ch. 183; Story Eq. Pl. § 500. This rule seems to have been of great antiquity in the Cartest Characteristics. Pl. § 500. This rule seems to have been of great antiquity in the Court of Chancery. See Story Eq. Pl. § 501, and cases cited. A similar rule, it is apprehended, prevails in the Courts of Equity in America, so far as they have been called upon to express any opinion on the subject. Story Eq. Pl. 500. § 502. See Williams v. Berry, 3 Stew. & Port. 284. It was formerly held in New York, that the Court of Chancery would not take cognizance of a

Case, where the amount in controversy was below 10t. sterling. Moore s. Lyttle, 4 John. Ch. 185; Fullerton v. Jackson, 5 John. Ch. 276.

The amount has been recently increased in that State by statute to the sum of one hundred dollars. 2 Rev. Stat. N. York, 173 § 37. See Vreden burg v. Johnson, 1 Hopk. 112; Mitchell v. Tighe, 1 Hopk. 119; Smets v.

Williams, 4 Paige, 364.

The value of the matter in dispute should appear by the record. Watson

v. Wells, 5 Conn. 468.

v. Wells, 5 Conn. 468.

The jurisdiction of the Court does not, however, depend upon the amount that may ultimately be found due to the plaintiff, but upon the claim stated by him. Bradt v. Kirkpatrick, 7 Paige, 62; Whitecotton v. Simpson, 4 J. J. Marsh 12; Judd v. Bushnell, 7 Conn. 205; Skinner v. Bailey, 7 Conn. 496; Wheat v. Griffin, 4 Day, 419; Douw v. Sheldon, 2 Paige, 323; Bailey v. Burton, 8 Wendell, 395. These provisions seem to apply, however, only to cases of bills for relief, and not to cases of bills for discovery merely. Goldey v. Beeker, 1 Edw. Ch. 271; Schrappel v. Redfield, 5 Paige, 345.

40s. (1); but instances occur in the books where bills have been Every thing to entertained for the recovery of ancient quit-rents, though very must be stated. small, viz., 2s. or 3s. per annum (18). It seems that if a bill is brought for a demand which, by the rule of the Court cannot be How inade-quacy of value sued for, the defendant may either demar to it, on the ground that taken advanthe plaintift's demand, if true, is not sufficient for the Court to tage of. ground a decree upon (n), or he may (which is the most usual course) move to have the bill dismissed, as below the dignity of the Court (o). But even if the defendant should take neither of these courses, yet, when the cause comes to a hearing, if it appears that, on an account taken, the balance due to the plaintiff will not amount to the sum of 101., the Court will dismiss the bill (p). Thus, in the time of Lord Harcourt, upon a bill being brought relating to tithes, it was clearly admitted that the plaintiff had a right to some tithes of the defendant, but as the tithes which were due appeared to be only of the value of 51., the Lord Chancellor dismissed that bill at the hearing (q); and in Brace v. Taylor (r), a similar objection was taken, at the hearing, and allowed (1).

A bill must not only be for a subject which it is consistent with Must be for the dignity of the Court to entertain, but it must also be brought whole matter. for the whole subject. The Court will not permit a bill to be brought for part of a matter only (s), so as to expose a defendant to be harassed by repeated litigations concerning the same thing; it therefore requires that every bill shall be so framed as to afford ground for such a decision upon the whole matter, at one and the same time, as may, as far as possible, prevent future litigation concerning it. It is upon this principle that the Court acts, in requiring in every case the presence, either as plaintiffs or defendants, of all parties interested in the object of the suit.

⁽l) Eq. Ca. Ab. 75. (m) Cocks v. Foley, 1 Vern. 360. (n) Fox v. Frost, Rep. T. Finch,

⁽o) Ros. 47, 356.

⁽p) Cowp. Eq. Pl. 166.

 ⁽q) Cited in Brace v. Taylor, infra.
 (r) 2 Atk. 253.

⁽s) Lord Red. 16.

⁽¹⁾ If it appear on the face of the bill, that the matter in dispute, exclusive of costs, does not exceed the amount to which the jurisdiction of the Court is limited, the defendant may either demur, or move to have the bill dismissed with costs; or if it does not appear on the face of the bill, it may be pleaded in bar of the suit. Smets v. Williams, 4 Paige, 364; McElwain v. Willis, 3 Paige, 505, S. C. on appeal, 9 Wendell, 548; Schræppel v. Redfield, 5 Paige, 245; Bradt v. Kirkpatrick, 7 Paige, 62.

By "exclusive of costs" above, is meant the costs of the suit in Chancery. Van Tyne v. Bunce, 1 Edw. Ch. 583.

Must be for the same principle, it will not allow a plaintiff who has two diswhole Matter.

on same defendant,

tinct claims upon the same defendant, or to which the same defendant may eventually prove liable, to bring separate bills for Not for one of each particular claim, or to bring a bill for one and omit the other, two claims up- so as to leave the other to be the subject of future litigation (1). Thus in Purefoy v. Purefoy (t), where an heir, by his bill, prayed an account against a trustee of two several estates, that were conveyed to him for several and distinct debts, and afterwards would have had his bill dismissed as to one of the estates, and have had the account taken as to the other only, the Court decided that an entire account should be taken of both estates, "for that it is allowed as a good cause of demurrer in this Court, that a bill is brought for a part of a matter only, which is proper for one entire account, because the plaintiff shall not split causes and make a multiplicity of suits." And so where there are two mortgages, and more money has been lent upon one of them than the estate is worth, the heir of the mortgagee cannot elect to redeem one and leave the heavier mortgage unredeemed, but shall be compelled to or where mort take both (u). Upon the same principle it is held, that "where there is a debt secured by mortgage, and also a bond debt, when the heir of the mortgagor comes to redeem, he shall not redeem the mortgage without paying the bond debt too, in case the heir be bound (z) (2)." The ground of this rule is the prevention of circuity of remedy; for as the bond of the ancestor, where the heir is bound, becomes, upon the death of such ancestor, the heir's

or in respect of one of two mortgages,

gage and bond.

(t) 1 Vern. 29. (z) Shuttleworth v. Laycock, 1 (u) Ibid. Margrave v. Le Hooke, Vern. 245; Anon. 2 Ch. Ca. 164. 2 Vern. 207.

own debt, and is payble out of the real estate descended, it is but

agreement or understanding may be inferred."
(2) See Story Eq. Jur. § 1023, note; Jones v. Smith, 2 Sumner's Vesey, 372, note (c) and cases cited. Lee v. Stone, 5 Gill. & John. 1.

⁽¹⁾ Story Eq. Pl § 287.

So at law a plaintiff cannot split an entire cause of action, so as to maintain two suits upon it, without the defendant's consent. If he attempt so tain two suits upon it, without the defendant's consent. If he attempt so to do, a recovery in the first suit, though for less than the whole demand, is a bar to the second. Ingraham v. Hall, 11 Serg. & R. 78; Crips v. Talvande, 4 M'Cord, 20; Smith v. Jones, 15 John. 229; Willard v. Sperry, 16 John. 121; Avery v. Fitch, 4 Conn. 362; Vance v. Lancaster, 3 Hayw. 130; Colvin v. Corwin, 15 Wendell, 557; Strike's case, 1 Bland. 95; James v. Lawrence, 7 Har. & John. 73; Stevens v. Lockwood, 13 Wendell, 644. See also Guernsey v. Carver, 8 Wendell, 492, and the remarks on it in Badger v. Titcomb, 15 Pick. 415. In this last case it was said that "as the law is, we think it cannot be maintained that a running account for the law is, we think it cannot be maintained, that a running account for goods sold and delivered, money loaned, or money had and received, at different times, will constitute an entire demand, unless there is some agreement to that effect, or some usage or course of dealing from which such an

reasonable that where the heir comes to redeem the estate by pay- Must be for ment of the principal money and interest, he should at the same time be called upon to pay off the bond, as otherwise the obligee would be driven to sue him for the recovery of the bond, which in the result might be payable out of the same property which the beir has redeemed.

whole Matter.

When it is laid down as a rule that the Court will not enter- Limitation of tain a suit for part of a matter, it must be understood as subject to rule to cases where matter this limitation, viz., that the whole matter is capable of being im-capable of immediately disposed of (1); for if the situation of the property in mediate dedispute is such, that no immediate decision upon the whole matter can be come to, the Court will frequently lend its assistance to the extent which the actual state of the case, as it exists at the time of filing the bill, will warrant. Upon this principle Courts of Equity act, in permitting bills for the preservation of evidence in perpetuam rei memoriam, which it does upon the ground that, from the circumstances of the parties, the case cannot be immediately the subject of judicial investigation; and if it should appear upon the bill that the matter to which the required testimony is alleged to relate can be immediately decided upon, and that the witnesses are resident in England, a demurrer would hold (y) (2). It is upon the same principle that the Court proceeds in all that class of cases in which it acts as ancillary to the jurisdiction of other Courts, by permitting suits for the preservation of property pending a litigation in the Ecclesiastical or Common Law Courts, or by removing the impediments to a fair litigation before tribunals of ordinary jurisdiction. In all these cases it is no ground of objection to a bill that it embraces only part of the matter, and that the residue is or may be the subject of litigation elsewhere. The preservation of the property, or the removal of the impediments, is all that the Court of Equity can effect; the bill, therefore, in seeking that description of relief, seeks the whole relief which, in such cases, a Court of Equity can give; but if a bill, praying only this description of relief, should disclose a case in which a Court of Equity is capable of taking upon itself the whole decision of the question, in such a case, it is apprehended, that

(y) Lord Red. 150.

⁽¹⁾ The principle is well established, that a contract to do several things, at several times, is divisible in its nature; and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a separate contract. Badger v. Titcomb, 15 Pick. 414.

(2) See Story Eq. Pl. § 303 and note; Moodelay v. Morton, 1 Bro. C. C. (Perkins's ed.) 469 and notes.

Must be for whole Matter.

the bill would be defective in not seeking the relief which the plaintiff is entitled to.

Whether bills can be sustained for partnership accounts without seeking dissolution.

With reference to this part of the subject may be noticed the much litigated question, whether a person engaged in trade in copartnership with others, can or cannot maintain a bill against his partners for an account, without praying also a dissolution of the partnership; upon this point the decisions are very conflicting, and all that can be done at present is to direct the reader's attention to the leading cases in favor of each proposition (1). In Forman v. Homfray (z), Lord Eldon said he did not recollect an instance of a bill filed by one partner against another, praying an account merely and not a dissolution, proceeding on the foundation that the partnership was to continue; and observed upon the inconvenience that would result if a partner could come here for an account merely, pending the partnership, as there seemed to be nothing to prevent his coming annually (a); and in Loscombe v. Russell (b), the V. C. of England allowed a demurrer to a bill praying the account of a partnership, because it did not pray for In Harrison v. Armitage (c), however, a contrary a dissolution. opinion was expressed by Sir John Leach, V. C.; and in Richards v. Davis (d), which was a bill by one partner against another, praying for an account of what was due to the plaintiff respecting

(z) 2 Ves. & B. 329; and see Marshall v. Colman, 2 J. & W. 267; Gow on Partnerships, Collyer on

Partnerships, App. 11.
(a) It is said by one of the learned reporters, in a note, that, in the case of theatres, the Court has refused to take jurisdiction upon any other principle than a dissolution of partner-ship; Waters v. Taylor, 15 Ves. 10. But it is to be observed that theatres are property of a very peculiar des-cription, and that any interference with the management of them by the Court might be productive of irreparable damage and ruin to the parties concerned, and that it is upon this principle that, in Waters v. Taylor,

the Court hesitated to interfere during the existence of the partnership. It was said by the the Solicitor general, arguendo in Loscombe v. Russell, that it appeared from the brief in Forman v. Homfray, that the plaintiff there prayed for an account which was to be continued until the end of the term of the partnership, 4 Sim. 8.

(b) 4 Sim. 8. (c) 4 Mad. 143, cited in Loscombe v. Russell, ubi supra.

(d) 2 Russ. & M. 349; and see observation of Lord Cottenham in Walworth v. Holt, 4 M. & C. 449, see ante, page 289.

⁽¹⁾ In 1 Story Eq. Jur. § 671, Mr. Justice Story says, "Courts of Equity, may, perhaps, interpose and decree an account where a dissolution of partnership has not taken place, and is not asked for; although, ordinarily, they are not inclined to decree an account, unless under special circumstances, if there is not an actual or contemplated dissolution, so that all the affairs of the partnership may be wound up." See also the cases cited in the note at the place above cited, and Waters v. Taylor, 15 Sumner's Vesey, 10 note (b) and cases cited; Judd v. Wilson, 6 Vermont, 185; 1 Smith Ch. Pr. (2nd Am. ed.) 89.

past partnership transactions, and that the partnership might be Must be for carried on under the decree of the Court, his Honor decreed an account of past partnership transactions, but said that he could make no order for carrying on the partnership concerns, unless with a view to a dissolution. In pronouncing his judgment upon that case, the learned Judge observed, that a partner during the partnership has no relief at Law for monies due to him on a partnership account; and that, if a Court of Equity refuses him relief. he is wholly without remedy, which would be contrary to the plain principles of justice, and cannot be the doctrine of equity. respect to the objection that the defendant might be vexed by a new bill, whenever new profits accrued, his Honor said, "What right has the defendant to complain of such new bill, if he repeats the injustice of withholding what is due to the plaintiff? Would not the same objection lie in a suit for tithes which accrue de anno in annum?" It is to be observed, that in the last quoted case of Richards v. Davis, the case of Clapple v. Cadell (e) was cited in argument, and is referred to by the reporter as an authority for the position that a decree may be made for partnership accounts without the bill having prayed a dissolution; but upon reference to the case itself, it will be found that it was one of a very peculiar nature, and that the principal object of the suit was not an account of the partnership transactions, but to have a declaration as to the effect of a sale of some shares in a partnership undertaking (the Globe newspaper); and that the account of the profits which was decreed was merely the consequence of the declaration of the Court upon that point. The same observation applies to Knowles v. Houghton (f), which is also referred to in Richards v. Davis (g). There the bill was filed to establish a partnership in certain transactions; and the sole question in the case was, partnership or no partnership; and the Court being of opinion that a partnership did exist in part of the transactions referred to. as a necessary consequence decreed an account of these transactions.

In endeavoring to avoid the error of making a bill not suffi- Definition of ciently extensive to answer the purpose of complete justice, care multifariousmust be taken not to run into the opposite defect, viz., that of ness. attempting to embrace in it too many objects, for it is a rule of Equity that two or more distinct subjects cannot be embraced in

⁽e) Jac. 537. (f) 11 Ves. 168.

⁽g) Ubi Supra.

Multifarious- the same suit. The offence against this rule is termed sultiferiousness, and will render a bill liable to demurrer (1).

> According to Lord Cottenham, it is utterly impossible, upon the authorities, to lay down any rule or abstract proposition as to what constitutes multifariousness, which can be made universally appli-The cases upon the subject are extremely various; and the Court, in deciding them, seems to have considered what was convenient in particular cases, rather than to have attempted to lay down an absolute rule. The only way of reconciling the authorities upon the subject is, by adverting to the fact, that although the books speak generally of demurrers for multifariousness, yet in truth such demurrers may be divided into two distinct kinds. Frequently the objection raised, though not termed multifariousness, is in fact more properly misjoinder; that is to say, the cases or claims united in the bill are of so different a character, that the Court will not permit them to be litigated in one record. It may be that the plaintiffs and defendants are parties to the whole of the transac-

> (1) Story Eq. Pl. § 271.
>
> "By multifariousness in a bill," says Mr. Justice Story, "is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters. ters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill." Story Eq. Pl. § 271; West v. Randall, 2 Mason, 201; Fellows v. Fellows, 4 Cowen, 682; Brinkerhoff v. Brown, 6 John. Ch. 139; Boyd v. Hoyt, 5 Paige, 65; Richardson v. M'Kinson, Litt. Sel. Ca. 320.

> If a joint claim against two or more defendants is improperly joined in the same bill with a separate claim against one of the defendants only, in which the other defendants have no interest, and which is wholly unconnected

with the claim against them, all or either of the defendants may demur to the bill for multifariousness. Swift v. Eckford, 6 Paige, 22.

A bill against one for a claim against him in his individual character, and another claim against him as heir for the debt of his ancestor, may be objected to for multifariousness. Bryan v. Blythe, 4 Blackf. 249.

A bill filed by an administrator, in conjunction with the heirs and distributes of the intestate, to recover paragral propagate in the heads of the

tributees of the intestate, to recover personal property in the hands of the defendant, and to divide and distribute it, is multifarious. Thurman s. Shelton, 10 Yerger, 383.

A joint claim against two defendants is improperly joined in the same bill with a separate claim against one of the defendants. Boyd s. Hoys, 5 Paige,

If a bill does not pray for multifarious relief, it cannot be objected to for

If a bill does not pray for multifarious relief, it cannot be objected to for multifariousness, though the cases stated would support a prayer for multifarious relief. Dick v. Dick, I Hogan, 290.

"The conclusion," says Mr. Justice Story, "to which a close survey of all the authorities will conduct us, seems to be, that there is not any pertive, inflexible rule, as to what, in the sense of Courts of Equity, constitutes multifariousness, which is fatal to a suit on demurrer." Story Eq. Fl. § 539; Oliver v. Pratt, 3 Howard (U. S.) 333, 411, 412. For a survey of the positions and doctrines held by Courts of Equity on this subject in different cases, see Story Eq. Pl. § 271-289, 530, 540; Bugbee v. Sargent, 23 Maine, 269. **269**.

tions which form the subject of the suit, and nevertheless those Multifarioustransactions may be so dissimilar, that the Court will not allow them to be joined together, but will require distinct records. But To rescind what is more familiarly understood by the term multifariousness, as leases to different persons applied to a bill, is, where a party is able to say he is brought as a by same trusdefendant upon a record, with a large portion of which, and of the tees. case made by which, he has no connection whatever (A). where a bill was exhibited by the trustees under a trust for sale, against several persons who were the purchasers of the trust estates, which had been sold to them by auction in different lots, Sir T. Plumer, V. C., allowed a demutrer, which had been put in by one of the defendants, on the ground that the bill was multifarious. His Honor said, "this Court is always averse to a multiplicity of suits, but certainly a defendant has a right to insist that he is not bound to answer a bill containing several distinct and separate matters relating to individuals with whom he has no coneern" (i). In a subsequent case, where an information and bill were filed for the purpose of setting aside leases, granted by the same trustees at different times to different persons, the same learned Judge held, that if the case had been free from other objections it would have been liable to the charge of multifariouswess (k). The same principle was afterwards acted upon by Lord Eldon, in Salvidge v. Hyde (1), where a bill had been filed for an account of a testator's estate, and also to set aside certain sales which had been made by the executor and trustee to himself and another person of the name of Laying, a demurrer to which bill had been put in by Laying, was overruled by Sir J. Leach, V. C. In bill to set (m). The case came on before the Lord Chancellor, by appeal, aside sales to when his Lordship reversed the judgment of the Vice-Chancellor, sons by trusand allowed the demurrer; observing, "that where there are tees. trustees to sell, and a bill filed against them, it is not usual to make the purchasers parties, but to state the contracts and pray an inquiry." His Lordship however added, "that there might Cases of exbe cases which cannot be delayed, till those inquiries can be ception. made, on account of the injury that may be done in the mean time" (1).

(A) Campbell v. Mackay, 1 M. & C. 618.

(i) Brooks v. Lord Whitworth, 1 Mad. 89; vide etiam, Reyner v. Julian, 2 Dick. 677, the marginal note

to which is wrong. (k) Attorney-general v. Moses, 2 Mad. 294-305.

(l) Jac. 151. (m) 5 Mad. 138, S. C.

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⁽¹⁾ See Story Eq. Pl. § 274. 33

Multifariouspersons with distinct interests in same transaction.

Secus, where claim arises under different wills or other instrument.

It is to be remarked that Sir J. Leach, in pronouncing his judgment upon this demurrer, observed, with reference to multi-In bills against fariousness, that "in order to determine whether a suit is multifarious, or in other words contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct." "If." says his Honor, "the object of the suit be single, but it happens that different persons have separate interests, in distinct questions, which arise out of that single object, it necessarily follows that such different persons must be brought before the Court in order that the suit may conclude the whole subject "(1). There is no doubt that, in the above observation the learned judge stated the principle correctly; though in his application of it, he went, in the opinion of Lord Eldon, too far. In the subsequent case of Turner v. Robinson (n), Sir J. Leach, carried the doctrine which he had above laid down to a much greater extent. In that case, a testator had bequeathed the residue of his personal estate to trustees in trust, to divide the same amongst his children, the shares of the sons to be paid to them at twenty-one, and the shares of the daughters to be laid out in government securities, the interest of which was to be paid to their separate use during their lives, and after their deaths the principal of each daughter's share was to be paid to such persons as such daughter should by any deed or writing, duly executed, or by her last will and testament appoint. The testator left ten children, and one of those children, a daughter, died, having by her will appointed and disposed of all her interest under the testator's will, in favor of the plaintiffs, to whom she also gave the residue of her own personal estate. The bill was filed by the plaintiffs against the personal representatives both of the father and of the daughter, and also against the surviving children of the father, and prayed that the trusts of both wills might be carried into execution, and an account of each estate, against the respective executors: to this bill

(n) 1 S. & S. 313.

⁽¹⁾ A bill in Equity is not multifarious, where one general right is claimed by the plaintiff, although the defendants may have separate and distinct rights. Dimmock v. Bixby, 20 Pick. 368. See Watson v. Cox, 1 Ired. Eq. 389; Stuart v. Coalter, 4 Rand. 74.

But a bill was held bad for multifariousness where it was brought against several defendants seeking redress for injuries arising out of transactions with them separately, at different times, and relating to different subjects. Coe v. Turner, 5 Conn. 86; Marselis v. Morris Canal, &c. 1 Saxton (N. J.)

a demurrer for multifariousness was put in by one of the surviving children of the father, who insisted that, although the plaintiffs, as appointees of their mother's share under the will of the original testator, were entitled to file a bill against the personal representatives of the testator and the other parties interested in the residue of his estate, yet that, in going on to pray an account of the daughter's estate the bill had been rendered multifarious, because the defendants who were interested in the father's estate only, ought not to be kept before the Court, whilst the accounts of the daughter's estate were being taken; the Vice-Chancellor, however, held that as the plaintiff's title to their shares of the original testator's estate, and to their mother's estate, were derived under the same instrument, they were entitled to unite the accounts of both estates in the same suit, and that therefore the bill was not multifarious (1).

It is with great diffidence that the writer presumes to advance an opinion in opposition to that of so great an authority as the learned Judge referred to, but he cannot avoid observing here, that the reason given by his Honor for the above decision does not appear to him sufficient to warrant the conclusion to which he came; for, though it is certainly true that in many cases the circumstance of the claims of a plaintiff arising under one instrument may justify his instituting a suit for the purpose of carrying all the objects of that instrument into execution, as in the common case of bills to carry the trusts of a will into effect, yet that circumstance will not authorize his bringing into the same suit all persons against whom he may casually have a claim under the same instrument, however distinct in other respects such claim may be. Thus in the case of Salvidge v. Hyde, before referred to, the object of the bill was the single one of executing the trusts of the will; and it was contended that the defendant the purchaser having entered into a contract under the circumstances amounting, according to the case made by the bill, to a fraud, was to be considered as a trustee for the plaintiffs, and that they had a right to have all the trusts performed in one suit; but Lord Eldon held otherwise, and said, that if an executor having a power to sell, agrees to sell to A. B., a bill cannot be filed against A. B., and also against the executor for an administration of the estate; and yet in that case the claim of the plaintiff for each species of relief arises under the same instrument. And so in Turner v. Robinson, now under consideration; it is true that the claim of the

(1) Story Eq. Pl. § 271 a, 535.

Multifariousness. plaintiffs to both descriptions of relief, arose under the same instrument, but, as in Salvidge v. Hyde, the relief sought against one set of defendants was totally different from that sought against the others; and in fact there was no privity between the cases beyond that which was derived from the mere circumstance of the plaintiff against each party being founded upon the same will, which in fact operated differently upon the different estates, namely, in the case of one estate by appointment, and in that of the other by testamentary disposition.

It may be observed here, that the above observations upon the opinion of Sir J. Leach, in Turner v. Robinson, appear to be in accordance with the opinion of the V. C. of England; who, upon Turner v. Robinson being cited before him, upon the argument of a demurrer for multifariousness, said that he could not coincide with the decision in that case, as he could not see how a person interested in the personal estate of two testators could, consistently with the rules of the Court, unite the two estates in the same suit (o) (1).

Unless same parties interested in both estates.

And accounts cannot be taken without blending claims.

Bills against parties claiming under subcontracts, not multifarious.

But although you cannot, in general, join the administration of the estates of two different persons in the same suit, where the parties interested in such estates are different, yet where the same parties claim the benefit of both estates, and they are so connected that the account of one cannot be taken without the other, the joinder of them in the same suit will not be multifarious (p).

This observation leads us to a distinction pointed out by Lord Eldon in the case of Salvidge v. Hyde above referred to, and which has perhaps been extended by those recent cases.

It will be recollected that it was a bill, by persons interested under a will, to set aside two contracts, one of which had been entered into by the trustees for sale of an estate to one of their own number, and the other for the sale of another estate to a person of the name of Laying; and Lord Eldon, although he thought that the object of setting aside the contract entered into with Laying could not be embraced in a bill to set aside the contract entered into with the trustee, yet held that if the trustee had purchased for himself, and then Laying had bought the same estate of him, the case would have been different.

(v) Marcos v. Pebrer, 3 Sim. 466, n. vide etiam, Duan v. Dunn, ibid. 329; and see 1 M. & C. 624. (p) Campbell v. Mackay, 1 M. & C. 603; and Lewis s. Edmusts, 6 Sim. 251.

⁽¹⁾ Unconnected demands against different estates cannot be united in the same bill, though the defendant is executor of both. Daniel v. Morrison, 6 Dana, 186; Kay v. Jones, 7 J. J. Marsh. 37.

From this it may be inferred, that an objection for multifari- Multifariousousness will not be allowed where the person making the objection, has united his case with that of another defendant, against whom the suit is entire and incapable of being separated (1). And so in Benson v. Hadfield (q), where the plaintiffs had appointed A., B., and C. their foreign agents, and A. had retired, whereupon the plaintiffs had appointed B., C., and D. their agents; they then filed a bill for an account of the two agencies, to which A. the retiring party demurred for multifariousness. In giving judgment upon the demurrer, Lord Langdale, M. R., observed, "I can very well conceive a case properly stated, in which it would be quite necessary, and it may ultimately be quite necessary in this case to continue, any person who was a partner in one of those agency firms, a party to the cause by which the accounts are to be taken;" but upon the perusal of the bill he did not find any such allegations, as appeared to render it necessary to continue as parties to the suit, the different persons parties to the transactions, and consequently he allowed the demurrer. And in the case of the Attorney-general v. Poole (r), where the case against one defendant was so entire as to be incapable of being prosecuted in several suits; but yet another defendant was a necessary party in respect of a portion only of that case, it was decided that such other defendant could not object to the suit on the ground of multifariousness (1). And in the case of Campbell v. Mackay (s), Lord Cottenham held, that where the plaintiffs have a common interest against all the defendants in a suit as to one or more of the questions raised by it, so as to make them all necessary parties for the purpose of enforcing that common interest, the circumstance of some of the defendants being subject to distinct liabilities, in respect to different branches of the subject-matter, will not render the Bill multifarious. The facts of the case were as follow: Sir James Campbell, by a deed of settlement, executed on his marriage with Lady D. L. Campbell, had vested a fund in two trustees, A. and B., upon trust for his wife for life, and after her decease in trust for the sons of the marriage who should attain the age of twenty-one years, and daughters who should attain twentyone years or marry, with a proviso that the persons to be appointed guardians of the children by his will, together with the trustees of the settlement, should have authority to apply the interest, and

⁽q) 5 Beav. 546. (r) 4 M. & C. 17.

⁽s) 1 M. & C. 603.

⁽¹⁾ Story Eq. Pl. § 278 a, and note. 33*

Multifariousness. also, in certain cases, part of the capital, of the children's presumptive shares, towards their maintenance and advancement. during their respective minorities. By a second deed, executed after marriage, Sir James Campbell vested another fund in two other trustees, C. and D., but upon similar trusts as those of the first settlement; and by his will, after making some specific bequests to his wife, he bequeathed his property to A., B., and C., upon certain trusts for the benefit of his children; and appointed A., B., and C., his executors and guardians of his infant children in conjunction with their mother. After the death of Sir James Campbell, Lady D. L. Campbell, the wife, together with the children of the marriage, filed a bill against A., B., C., and D., for the accounts and administration of the property comprised in the two deeds and will, to which bill a joint demurrer was put in by A., B., and C., on the ground of multifariousness, which was overruled, upon argument, by the Vice-Chancellor, and afterwards by the Lord Chancellor upon appeal, his Lordship being of opinion, that the result of the principles to be extracted from the case was, that where there is a common liability and a common interest, the common liability being in the defendants, and the common interest in the plaintiffs, different grounds of property may be united in the same record.

It should be noticed here, that where the right of a party to call upon the Court for specific relief against another is so encumbered that he cannot assert his own right till he has got rid of that incumbrance, he cannot include the object of getting rid of the incumbrance, in a suit for the specific relief which, but for that incumbrance, he would be entitled to; and that, if he attempt to do so by the same suit, his bill will be multifarious. Thus it was held by Lord Eldon that, when a bill is filed for specific performance, it should not be mixed up with a prayer for relief against other persons claiming an interest in the estate; and that if there is a title in other persons which the plaintiff is bound to get in, he should file a bill for specific performance only, and should fortify the defect in his title, by such means as he can, so as to be enabled to complete it by the time when the contract will be enforced (t) (1).

Bill for infringement of patent cannot include infringement by different defendants.

The principle which renders it improper to mix up, in the same bill, demands against different persons arising out of distinct trans-

(t) Mole v. Smith, Jac. 494; see also 2 Sch. & Lef. 367; auto, p. 280.

⁽¹⁾ Story Eq. Pl. § 272.

actions, renders it improper to include in one suit separate in- Multifariousfringements of the same patent, by different defendants (u); and for the same reason, where a copyright has been infringed, bills must be filed against each bookseller taking spurious copies for sale (x) (1). And so joint and separate demands cannot be joined in a bill (y) (2); and, although the defendant may be liable in respect of every one of the demands made by the bill, yet they may be of so dissimilar a character as to render it improper to include them all in one suit. The objection in these cases is more strictly called misjoinder, and has been before alluded to in the quotation from Lord Cottenham's judgment in Campbell v. Mackay. The distinction between misjoinder and multifariousness is clearly exhibited in the case of Ward v. The Duke of Northumberland (z). In that case the plaintiff had been tenant of a colliery under the preceding Duke of Northumberland, and continued also to be tenant under his son and successor, the then Duke, and he filed a bill against the then Duke and Lord Beverley, who were the executors of their father, seeking relief against them, in respect to transactions part of which took place in the lifetime of the former Duke and part between the plaintiff and the then Duke after his father's decease. To this bill the defendants put in separate demurrers, and the forms of the two demurrers, which were very different, clearly illustrate the distinction above The Duke could not say there was any portion of the bill with which he was not necessarily connected, because he was interested in one part of it as owner of the mine, in the other as representing his father. But his defence was that it was improper to join in one record a case against him as representative of his father, and a case against him arising out of transactions in which he was personally concerned. The form of his demurrer was that there was an improper joinder of the subject-matters of Lord Beverley's demurrer again was totally different; the suit. it was in the usual form of a demurrer for multifariousness, and proceeded on the ground that by including transactions which occurred between the plaintiff and the other defendant with transactions between the plaintiff and the late Duke (with the latter of which only Lord Beverley could have any concern), the bill was

⁽y) Harrison v. Hogg, 2 Ves. J. (u) Dilly v. Doig, 2 Ves. J. 486. (z) Ibid. (z) 2 Ans. 469.

Story Eq. Pl. § 277, 278.
 Swift v. Eckford, 6 Paige, 22, cited ante, 384, note; Story Eq. Pl. §

Multifariousness.

drawn to an unnecessary length, and the demurring party exposed to improper and useless expense. Both demurrers were allowed, and both it may be said in a sense for multifariousness, but it is obvious that the real objection was very different in the two cases (a) (1). In Harrison v. Hogg (b), which was also more properly a case of misjoinder, the plaintiffs endeavored to unite in one record a demand in which all the plaintiffs jointly had an interest, and the demurrer was allowed upon the ground that the subject-matters were such as in the opinion of the Court ought not, according to the rules of pleading, to be included in one suit (2). In Saxton v. Davis (c), the suit prayed an account against the representatives of a bankrupt's assignees, and against Davis, a person who claimed through those assignees, and also against a person who had been his assignee under the Insolvent Debtors Act, and there also the bill was held to be bad for multifariousness.

Bills to establish general right against defendants interests.

right to a fishery.

- for commissions to ascertain boun-

daries.

It is to be observed, that this objection will only apply where a plaintiff claims several matters of different natures by the same bill; and that where one general right only is claimed by the bill, having distinct though the defendants have separate and distinct interests, a demurrer will not hold (d) (3). As where a person claiming a general right to the sole fishery of a river, files a bill against a number of persons claiming several rights in the fishery, as lords of - to a duty. manors, occupiers of lands or otherwise (e); so, in a bill for duties, the city of London were permitted to bring several of the persons before the Court, who dealt in those things whereof the duty was claimed, to establish the plaintiff's right to it; and where the lord of a manor filed a bill against more than thirty tenants of the manor, freeholders, copyholders and lease holders, who owed rents to the lord, but had confused the boundaries of their several tenements, praying a commission to ascertain the boundaries, and it was objected, at the hearing, that the suit was improper, as it brought before the Court many parties having distinct interests, it was answered that the lord claimed one general right, for the assertion of which it was necessary to ascertain the seve-

⁽a) 1 M. & C. 619.

⁽b) 2 Ves. J. 323.

⁽c) 18 Ves. 72.

⁽d) Lord Red. 182.

⁽e) Mayor of York v. Pilkington, I Atk. 282, cited ibid.

⁽¹⁾ Story Eq. Pl. § 276, 285, 530.

⁽²⁾ Story, Eq. Pl. § 279; Boyd v. Hoyt, 5 Paige, 65, cited, ante, 384, note.

⁽³⁾ Dimmock v. Bixby, 20 Pick. 368, cited in note, ante, 386; Story Eq. Pl. § 278 and note.

ral tenements; and a decree was made accordingly (f). Upon Multifariousthe same principle it is that one suit is entertained for the tithes , against several parishioners. Suits of this nature, however, must all be for objects of the same nature; and if a bill is filed against several defendants for objects of a different nature, although the plaintiff claims them all in the same character, it will be multifarious; thus, if a parson should prefer a bill against several persons, vis. against some for tithes and against others for glebe, it would be liable to demurrer; and so if the lord of a manor were

to prefer one bill against divers tenants for several distinct matters and causes, such as common, waste, several piscary, &c., this would be wrong, though the foundation of the suit, viz., the ma-

- for tithes.

the meaning of multifariousness to cases where a plaintiff de-against one for mands several matters of different natures of several defendants distinct cauby the same bill (k); but in the Attorney-general v. The Gold-ses. smiths' Company (i), the V. C. of England says, "I apprehend that, besides what Lord Redesdale has laid down upon the subject, there is a rule arising out of the constant practice of the Court, that it is not competent where A. is sole plaintiff and B. is sole defendant, for A. to unite in his bill against B. all sorts of matters wherein they may be mutually concerned (1). If such a mode of proceeding were allowed, we should have A. filing a bill against B., praying to foreclose one mortgage; and, in the same bill, praying to redeem another, and asking many other kinds of relief with respect to many other subjects of complaint." In that case the information against the Company stated that Bills not filed there was a charity for the benefit of young men being free of the against corpo-Company, and then alleged that divers other bequests had been tinct charities.

It is to be remarked, that Lord Redesdale appears to confine Not filed

made to the Company for the purpose of making loans to young

nor, be an entire thing (g).

men for their advancement in business or life, and prayed that the first-mentioned charity, and all other (if any) like gifts and bequests to the Company might be established, and that the due-

⁽f) Magdalen Coll. v. Athill, Ld. Red. 183.

⁽i) 5 Sim. 670-5; and see Attorney-general v. The Corporation of (a) Lord Red. 182.

⁽¹⁾ See Story Eq. Pl. 280.
See Carmichael v. Bowder, 3 Howard (Miss.) 252; Roberston v. Stovens, 1 Ired. Eq. 247; Story Eq. Pl. § 282; Lynch v. Johnson, 2 Litt. 104.
Debt and detinue may be joined, and for a similar reason, a climate of a specific tract of land, and for a sum of money, the parties being the same, may be united in the same suit in Chancery. Whitney v. Whitney, 5 Dana, 329.

Multifariousnesa

performance of the charitable trusts might be enforced for the future, &c., and the Vice-Chancellor, upon a demurrer being put in to the information because it was exhibited for several and distinct matters which ought not to be joined together in one information, held the information to be multifarious, and allowed the demurrer (k) (1).

Unless they are homogeneous.

It should be noticed that, in the above case, there was nothing in the information to show that the character of the bequest was homogeneous, and that his Honor held that if there had been any allegation to show that they were of that character, although there might be minute differences between the bequests, they might all have been comprised in the same information; as in the case of the Attorney-General v. The Merchant Tailors' Company (1), where the information prayed the establishment or regulation of a great number of different charitable gifts, which were stated in the information to have been made to the Company, by way of bequest, or otherwise, on trust, to lend out the same to freemen of the Company, or upon some other like or corresponding trust, for the benefit or advancement of freemen in trade or business. The number of charities in respect of which the relief was sought by the information was eight; but as they were to be applied mainly and substantially for the same objects, and it appeared upon the information that, owing to the minuteness of the sums, each of them could not be administered as the donors pointed out, the Vice-Chancellor thought that the Court ought, at the hearing, to deal with them conjointly, and that the information was not multifarious (2).

Bills to perpetuate testimony, and for other purposes.

Upon the same principle, it has been held that where matters are joined in the same bill which require the publication of the depositions of the same witnesses at one time, and other depositions from them at a subsequent time, the bill will be multifarious. Thus, in Dew v. Clarke (n), where the objects of the bill were to perpetuate the testimony of witnesses, and also to obtain immediate relief, founded upon the evidence of the same witnesses, a demurrer for multifariousness was allowed.

From the above cases it may be deduced that a plaintiff cannot join in his bill, even against the same defendant, matters of dif-

⁽k) 5 Sim. 670-5. (n) 1 S. & S. 108; and see Shack-(l) 5 Sim. 288; and see 1 M. & ell'v. Macaulay, 2 S. & S. 79. K. 189.

See Story Eq. Pl. § 532, 533.
 Story Eq. Pl. § 281.

ferent natures, although arising out of the same transaction; yet, Multifariouswhen the matters are homogeneous in their character, the introduction of them in the same bill will not be multifarious (1); and it Where differis to be observed, that this distinction will not be affected by the ent matters homogeneous circumstance of the plaintiff claiming the same thing under dis- bill not multitinct titles, and that the statement of such different titles in the farious. same bill will not render it multifarious. Thus, where a bill was Plaintiff may filed for tithes by the rector of a parish in London, in which the right by differtitle was laid under a decree made pursuant to the 37th Hen. VIII. ent titles. c. 12, by which payment of tithes was decreed in London at the rate of 2s. 9d. in the pound on the rents, with a charge that in case such decree should not be deemed binding, the plaintiff was entitled to a similar payment, under a previous decree, made in the year 1535, and confirmed by the same Act; and in case neither of the said decrees were binding, the bill charged that the plaintiff was entitled, by ancient usage and custom from time immemorial, to certain dues and oblations calculated according to rent at 2s. 9d. in the pound, &c., a demurrer for multifariousness was overruled (o).

As a bill by the same plaintiff against the same defendant for Bills by severdifferent matters would be considered multifarious, so, a fortiori, al claiming would a bill by several plaintiffs, demanding distinct matters, against the same defendants (p) (2). Thus, if an estate is sold By purchasers in lots to different purchasers, the purchasers cannot join in ex- at an auction. hibiting one bill against the vendor, for a specific performance; for each party's case would be distinct, and there must be a distinct bill upon each contract (q) (3). Upon the same principle, By heir and where the heir and next in kin of an intestate, who was an infant, next of kin for real and perwas joined with his sister, who was the other next of kin, as plain- sonal estate tiff in a bill against the widow, who had taken out administration multifarious. to the intestate's effects, and had also taken possession of the real estate, as guardian to the infant heir, for an account both of the real and personal estate, the V. C. of England allowed a demurrer for multifariousness, on the ground that the interests in the

⁽o) Owen v. Nodin, M'Lel. 238, Turn. & R. 301. Price, 478, S. C. (q) Coop. Eq. Pl. 182; and see (p) Jones v. Garcia, del Rio, 1 Hudson v. Maddison, 12 Sim. 416. 13 Price, 478, S. C.

⁽¹⁾ See Story Eq. Pl. § 531, 532, 533. (2) See Finley v. Harrison, 5 J. J. Marsh. 158; Kay v. Jones, 7 J. J. Marsh. 37.

⁽³⁾ Story Eq. Pl. § 272 and notes.

Not necessary

Multifarious real and personal estate were distinct from each other (r) (1). And it has been decided that a bill does not become multifarious because all the plaintiffs are not interested to an equal extent; as

that all plaintiffs be equally in Knye v, Moore (s), where a bill was filed by a woman and her interested. children to compel the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of the delivery of dant had made a provision for the woman (with whom he had cohabited), and her children, and which had been executed in pursuance of an agreement, whereby he was bound, besides the execution of the deed, to pay to the woman an annuity for her life, an account of which was also sought by the bill; it was objected upon demurrer that the bill was multifarious, because, besides seeking the performance of the agreement under which the mother alone was entitled, it joined to that, the claim for the deed in which she was interested jointly with her children; but Sir J. Leach, V. C., thought that the whole case of the mother being properly the subject of one bill, the suit did not become multifarious, because all the plaintiffs were not interested to an equal extent (t) (2).

Several may claim under one general right.

As in bill of

peace.

incurring the risk of a demurrer for multifariousness, although the title of each plaintiff may be distinct; thus, in Powell v. The Earl of Powis (u), where the freehold tenants of a lordship having right of common over certain lands, the lord approved parts of the common lands and granted them to other persons; but the tenants prostrated the fences, upon which actions of trespass were brought against them, and they filed a bill in the Court of Exchequer, in the nature of a bill of peace, against the lord and his grantees, to be quieted in the enjoyment of their commonable rights; a general demurrer was overruled, the Court being of opinion that the objection that the plaintiffs might each have a right to make a separate defence to the actions at Law, was

And so where several persons claim under one general right,

they may file one bill for the establishment of that right, without

Multifuriousness objected to by demurrer

or answer.

The proper way in which to take advantage of multifariousness in a bill is by demurrer, and it is too late to object to a suit on

not valid, as there was one general question to be settled, which

(r) Dunn v. Dunn, 2 Sim. 329, vide etiam, Maud v. Acklom, ib. 331; Exeter College v. Rowland, Mad & Geld. 94.

(s) 1 S. & S. 61. (t) Vide observations on this case in Dunn v. Dunn, 2 Sim. 329. (w) 1 Y. & J. 159.

pervaded the whole.

Ante, 384, note.
 Story Eq. Pl. § 279 a.

that ground at the hearing (v) (1). It seems, however, from the Multifariousreport of the Master of the Rolls' judgment in Greenwood v. Churchill (z), that the objection may be taken by answer, and that Court somethough the defendants are precluded from raising the objection at times objects. the hearing, the Court itself will take the objection, if it thinks fit to do so, with a view to the order and regularity of its proceedings.

Great care must be taken in framing a bill that it does not con- Scandal and tain statements, or charges which are scandalous or impertinent. impertinence. for, if it does, it may be objected to by the defendant; and if upon reference to a Master of the Court, to inquire into the foundation of such objection, he should report that the bill does contain matter criminal or scandalous, or not pertinent to the subject of litigation, such parts will be expunged with costs to the party aggrieved (2); and it is said that the counsel who drew or signed the bill shall pay such costs (3).

Scandal consists in the allegation of anything either in a bill, Definition of answer, or any other pleading, which is unbecoming the dignity scandal. of the Court to hear, or is contrary to good mannets, or which charges some person with a crime not necessary to be shown in the cause (a); to which may be added that any unnecessary allegation bearing cruelly upon the moral character of an individual is also scandalous (b) (4).

(y) Ward v. Cooke, 5 Mad. 122;
 Wynne v. Callander, 1 Ruse. 293.
 (z) 1 M. & K. 559.
 (a) Prac. Reg. 383.

(b) Per Lord Eldon, in Ex parte Simpson, 15 Ves. 476; and see Coffin v. Cooper, 6 Ves. 514.

(1) Story Eq. Pl. § 284 a. It is held, in the following cases, that advantage must be taken of multifariousness by demurrer: Bryan v. Blythe, 4 Blackf. 249; Grove v. Fresh, 9 Gill & John. 261; Thurman v. Shelton, 10 Yerger, 383; Luckett v. White, 16 Gill & John. 480. See Avery v. Kellogg, 11 Conn. 562.

Filing an answer and going into an examination of testimony as to the

reining an answer and going into an examination of testimony as to the merits of the whole matter in controversy is a waiver of the objection. Gibbs v. Clagett, 2 Gill & John. 14. But see Murdock v. Ratcliff, 7 Ohio, 119. But the Court may at the hearing sua sponte dismiss a bill for multifariousness. Ohio v. Ellis, 10 Ohio, 456. See Story Eq. Pl. § 284 a.

In Oliver v. Piatt, 3 How. (U. S.) 333, 412, it was held that the objection of multifariousness cannot as a matter of right be taken by the parties except on degree the plant of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the property of the cept on demurrer, ples or answer; if not so taken, it must be regarded as waived. It cannot be insisted on at the hearing; though the Court may take it at any time sus spense, whenever deemed necessary to the proper administration of justice.

(2) See as to answer, Langdon v. Pickering, 19 Maine, 214.
(3) Story Eq. Pl. § 266; Doe v. Green, 2 Paige, 349; Somers v. Torrey, 5 Paige, 54; Powell v. Kane, 5 Paige, 265.

(4) Facts not material to the decision, are impertinent, and if reproachful, are scandalous. Woods v. Morrell, 1 John. Ch. 103.

Scandal and Impertinence. Nothing material scandalous.

There are many cases, however, in which, though the words in the record are very scandalous, and highly reflecting upon the party, yet if they are material to the matter in dispute, and tend to a discovery of the point in question, they will not be considered as scandalous (1); for a man may be stated on the record to be guilty of a very notorious fraud, or a very scandalous action, as in the case of a brokerage bond given before marriage to draw in a poor woman to marry, or in the case where a man falsely represents himself to have a great estate, when in fact he is a bankrupt; or where one man is personated for another; or in the case of a common cheat, gamester, or sharper, about the town; in these, and many other instances, it may appear to be very scandalous. and not fit to remain on the records of the Court; and yet, perhaps, without having an answer to this very matter, the party may lose his right: the Court, therefore, always judges whether, though matter be prima facie scandalous, it is or is not of absolute necessity to state it; and if it materially tends to the point in question (c), and is become a necessary part of the cause, and material to the defence of either party, the Court never looks upon this to be scandalous (d). Were it otherwise, it would be laying down a rule that all charges of fraud are scandalous, which would be dangerous (e); upon this principle, therefore, it has been determined, that if a bill be filed by a cestui que trust for the purpose of removing trustee, it is not scandalous or impertinent to challenge every act of the trustee as misconduct, or to impute to him corrupt or improper motives in the execution of the trust, or to allege that his conduct is the vindictive consequence of some act on the part of the cestui que trust, or of some change in his situation (f). It is to be observed, however, that in such case it

In bill to remove trustees not scandalous to impute corrupt motives. Or allege vindictive motives.

(c) Everett v. Prythergh, 12 Sim. 363.

(d) Gilb. For. Rom. 207.

(e) Fenhoulet v. Passavant, 2 Ves.

(f) Earl of Portsmouth v. Fellows, 5 Mad. 450; and see Anon. 1 M. & C. 78; and Lord St. John v. Lady St John, 11 Ves. 526.

(1) Story Eq. Pl. § 269. Thus a statement in an answer, introduced to show the temper with which a bill is filed, and the oppressive course pursued by the plaintiff, is not scandalous or impertinent; inasmuch as it may have an effect on the costs. Desplaces v. Goris, 1 Edw. 350.

So it has been held, that an executor, who is called to account, is not subject to an exception for scandal and impertinence, for saying in his answer, that some of the property is withheld from him, under a forged deed pos-sessed by the plaintiff; for his silence might prejudice him afterwards. Joily v. Carter, 2 Edw. 209. See Somers v. Torrey, 5 Paige, 54; Rees v. Evans, Chancery, N. York, Jan. 25, 1841, cited 1 Smith, Ch. Pr. (2nd Am. ed.) 567, note (b).

would be impertinent, and might be scandalous to state any cir- Scandal and cumstance as evidence of general malice or personal hostility, without connecting such circumstance with the acts of the trustee Secus, to allege which are complained of, because the fact of a party entertaining general mogeneral malice or hostility against the plaintiff, affords no necessonal hostility. sary or legal inference that the conduct of the trustee in any particular instance results from such motive.

Impertinence.

It has been decided, that under a general charge of immorality, Or state parevidence of particular instances of misconduct may be intro-ticular acts of Where therefore such evidence can be made use of which may be under the general charge, the specific instances should not, if it proved under can be avoided, be introduced into the bill; thus it is improper in general charge a suit which is founded upon the want of chastity in a particular individual, as in cases of bills to set aside securities given turpi consideratione, to charge particular instances of levity which might affect the character of strangers, and to fill the record with private scandal, because evidence of those particular instances may be given under the general charge (k).

From what has been said before, it may be collected that al- Definition of though nothing relevant can be scandalous; matter, in a bill, may impertinence. be impertinent without being scandalous (i) (1).

Impertinences are described by Lord Chief Baron Gilbert to be, "where the records of the Court are stuffed with long recitals, or with long digressions of matter of fact, which are altogether unnecessary and totally immaterial to the matter in question; as where a man will tell a tale of a tub, where he sets forth a long

(g) Whaley v. Norton, 1 Vern. 483; Clark v. Periam, 2 Atk. 333, (A) Ibid. (i) Fenhoulet v. Passavant, ubi supra.

⁽¹⁾ Hood v. Inman, 4 John. Ch. 437. Impertinence is the introduction of any matters into a bill, answer, or other pleading or proceeding in a suit, which are not properly before the Court for decision at any particular stage of the suit. Story Eq. Pl. § 266; Wood v. Mann, 1 Sumner, 506, 578. See the 26th and 27th rules of the Equity Rules of the Sup. Court of the U. S. Jan. Term, 1842, in Story Eq. Pl. §

The best test to ascertain whether matter be impertinent, is to try whether the subject of the allegation could be put in issue, and would be matter proper to be given in evidence between the parties. Woods v. Morrell, 1 John. Ch. 103.

The Court will not, because there are here and there a few unnecessary words, treat them as impertinent. Story Eq. Pl. § 267; Hawley v. Wolverton, 5 Paige, 522.

A bill may contain matter which is impertinent, without the matter being scandalous; but if, in a technical sense, it is scandalous, it must be imper-Story Eq. Pl. § 270; M'Intyre v. Trustees of Union College, 6 Paige, 239.

Scandal and Impertinence.

deed which is not prayed to be set forth in hac verba, where he stuffs his answer with long recitals which are nothing to the purpose, as where a bill of revivor is brought, and the party will set forth in hac verba, not only the original bill and answer, but the whole proceedings in the cause; whereas, all these being matters of record, and of which the party hath once paid for copies, he ought not to pay for them over again, nor is there occasion to set them forth over again in hac verba, or to make an unnecessary repetition thereof, for they ought to be set forth very concise and short (k)." From the above definition it will be seen, that impertinence is the same description of fault in pleadings in Equity which. in those at Common Law, is denominated surplusage. Law, taken in its largest sense, includes the introduction of unnecessary matter of whatever description, and includes as well the admission of matter wholly foreign, as well as of matter which, though not wholly foreign, does not require to be stated, or which if stated, should be so with conciseness (1). The former of these species of surplusage, however, is what comes mose properly under the description of impertinence, whilst the latter may be termed The attention of the reader is called to this distinction. because some difference of opinion exists concerning the consequence of introducing superfluous matter of the latter class in pleadings in Equity. In Lowe v. Williams (m), Sir J. Leach, V. C., appears to have considered that the proper check to abuses of this description would be in costs, that it would subject a pleader to innumerable difficulties, if relevant matter were to be deemed impertinent, wherever it is less concisely expressed than the nature of the case necessarily requires; and the same opinion appears to have been adopted by the Lord Chief Baron Alexander. in Balby v. Williams (n). On the other hand, in Slack v. Evans (o), Lord Eldon appears to have held that needless prolixity was in itself impertinence, although the matter should be relevant. In that case a motion had been made for a special reference to the Master to tax the costs of a prolix schedule which the Master had reported to be pertinent, and the Lord Chancellor said, "the true question is, whether a case can exist in which a Master can report an answer to be pertinent, but that he cannot do justice without a special reference being made to him to inquire

Same as surplusage at law.

Distinction between impertinence and prolixity.

⁽k) Gilb. For. Rom. 209.

⁽l) Stephens on Pleading, 422. (m) 2 S. & S. 575-577.

⁽n) 1 M'Lel. & Y. 334.

⁽o) 1 Price, 278,n.; and see M'Morris v. Elliott, 8 Price, 674; Gompertz v. Best, 1 Y. & C. 117, Ex. R.; and see post Ch. on Answers.

into some prolixity not impertinent. For this no authority is Scandal and cited; and if I decide with the Master, I must decide that this prolixity is not impertinent, which I should be reluctant to do. If in an examination, the examinant sets forth tradesmens' bills at length, it is impertinent. If pertinence and impertinence be so mixed that they cannot be separated, the whole is impertinent (1). So a prolix setting forth of pertinent matter is impertinent." With reference to the last point it is to be observed, that, in the orders of the Court, the useless repetitions of deeds and writings in hac verba, causeless recitals, tautologies, and multiplication of words, are enumerated with the other impertinences to be avoided (p); upon the whole, however, it must be admitted that it is difficult to lay down any general rule upon the subject, and that the question whether a relevant statement has been made with so much prolixity as to call for the interference of the Court, further than the expression of its censure, must depend on the circumstances of each particular case (q).

It is to be observed, that neither scandal nor impertinence, No ground for however gross it may be, is a ground of demurrer, it being a demurrer. maxim of pleading that utile per inutile non vitiatur. Where How taken adhowever there is scandal or impertinence in a bill, the defendant vantage of. is entitled to have the record purified by expunging the scandalous or impertinent matter. In order that this might be done, the Old practice. course formerly was for the defendant to move the Court for an order to have the bill referred to a Master to report whether it was scandalous or impertinent (2). This reference was obtained of course, and being general, without specifying the particular passages objected to (r), obviously precluded the party, whose pleading was alleged to be scandalous, from exercising any judgment upon the subject, much less from submitting to have the objectionable passages expunged. To remedy this a regulation has Under the new been made, under which no order can be made for referring any orders.

⁽p) Beame's Ord. 70, 166. 1 Ph. 383. (q) Attorney-general v. Rickards, (r) 1 Harr. 43.

⁽¹⁾ An exception for impertinence will be overruled, if the expunging the matter excepted to, will leave the residue of the clause, which is not covered by the exception, either false or wholly unintelligible. M'Intyre v. Trustees Union College, 6 Paige, 239.

⁽²⁾ Story Eq. Pl. § 269. If an answer contain scandalous or impertinent matter, it will be referred, in order that it may be expunged at the cost of the party filing the answer. Mason v. Mason, 4 Hen. & Munf. 414. See Langdon v. Pickering, 19 Maine, 214.

Scandal and Impertinence. Exceptions must be taken.

pleading, or other matter depending before the Court, for scandal or impertinence, unless exceptions are taken in writing, and signed by counsel, describing the particular passages which are alleged to be scandalous or impertinent (s) (1).

It appears to have been, formerly, the opinion that, in cases of scandal, "the Court itself was concerned to keep its records clean, and without dirt or scandal appearing thereon;" and in ex parte Simpson (t), Lord Eldon said that, with reference to the subject of scandal in proceedings, either in causes or in bankruptcy, he did not think that any application by any person was necessary; and that the Court ought to take care that, either in a suit or in a proceeding in bankruptcy, allegations bearing cruelly upon the moral character of individuals, and not relevant to the subject. should not be put upon the record.

There was formerly some doubt whether under any circumstances a person not a party to the cause could procure a reference of any record for scandal (u).

Reference by person not a party to the Cause.

In the recent case of Williams v. Douglas (z), the authorities upon the subject were brought before Lord Langdale M. R., who had to decide upon the question, whether a person, not being a party to the cause, who alleges that the bill contains matter at the same time impertinent as between the parties, and scandalous as against him, is, of course, and without leave, entitled to file exceptions for scandal, and to obtain an order to refer the exceptions to the Master, with a view to have the scandalous and impertinent matter (if it be so found) expunged (2). His Lordship said, "There is but little authority on the subject: but from the terms in which Lord Bacon's order (y) is expressed, from the dicta of Lord Eldon, expressed in a manner to show that he had considered the subject, and from the apparent necessity of the case, there being, as I conceive, no other way of doing effectual justice to an injured party, it would seem that the Court must have jurisdiction and authority to expunge scandal from the record, at

Anon. 4 Mad. 252.

(s) 38 Order, May, 1845. (t) 15 Ves. 476.

(z) 5 Beav. 82. (y) Beames, 25.

⁽u) Coffin v. Cooper, 6 Ves. 514;

⁽¹⁾ Langdon v. Pickering, 19 Maine, 214.
Exceptions for scandal or impertinence must point out the exceptionable matter with sufficient certainty to enable the adverse party and the officers of the Court to ascertain, what particular parts of the pleading or proceeding are to be stricken out, if the exceptions are allowed. Whitmarsh v. Campbell, 1 Paige, 645; Franklin v. Keeler, 4 Paige, 382. See also German v. Machin, 6 Paige, 288.

(2) Story Eq. Pl. § 270.

the instance of a person who may not be a party to the cause. His Lordship, however, thought that a person not a party to the record cannot adopt this proceeding without special leave; and he therefore discharged the order then in question on the ground of its having been obtained ex parte. It seems, also, that a defendant may refer the answer of a co-defendant; and that before he has been served with process, he may appear gratis, and procure an order for such a reference (z) (1).

From this case, it would appear, that a stranger to the suit can, if the circumstances justify it, obtain the leave of the Court to refer a record for scandal; there is not, however, any reason to suppose, that mere impertinence could ever justify an order of reference on behalf of a person not a party to the cause.

This distinction is implied in the language of the 16th Order, Six days to obof May, 1845, (Art. 6,) according to which, any person or party tain the order of reference. having filed exceptions to any pleading, or other matter depending before the Court for scandal, and any party having filed exceptions for impertinence, is to obtain an order to refer the same to the Master, within six days after the filing thereof. If he does not, the exceptions are are to be considered as abandoned, and the costs are to be paid by the exceptant (a); and by the 7th Art., Fourteen days it is provided, in like manner, that the Master's report upon the Master's reexceptions, must be obtained within fourteen days after the date port. of the order, or within such further time as the Master thinks fit to allow, otherwise, the order is to be considered as abandoned, and the costs are to be paid by the exceptant (b).

It is to be observed, with reference to the form of exceptions for impertinence, that it has been decided that one exception cannot be partially allowed, and therefore, if part of an exception be good, and the rest bad, the whole exception must be overruled (c) (2).

The Master, upon a bill, answer, or other pleading being refer- Master's certired to him, exercises his judgment upon the case, and certifies his ficate. opinion thereon to the Court (3). This certificate is in the nature of a report, of which however he prepares no draft; and as no objec-

(z) Fell v. Christi Coll. 2 Bro. C. C. 279.

(a) 39th Order, May, 1845. (b) 40th Order, May, 1845.

(c) Wagstaff v. Bryan, 1 R. & M. 30; Tench v. Cheese, 1 Beav. 571; Byde v. Masterman, Cr. & Ph. 265.

Impertinence.

^{(1) 1} Smith Ch. Pr. (2nd Am. ed.) 569, 570.

⁽²⁾ Desplaces v. Goris, 1 Edw. 353.
(3) The Court, in cases of impertinence, ought, before expunging the matter alleged to be impertinent, to be especially clear, that it is such as

Impertinence. quire no con-

firmation.

Scandal and tions lie to the report, it requires no confirmation by the Court (d). The certificate, however, must be filed at the Report Office, and an References re- office copy taken for use. A party dissatisfied with the Master's determination, may file exceptions to the report, and bring it on in that shape before the Court (e); but if he takes proceedings to expunge the matter reported to be impertinent, he will be consider-But may be ex- ed to have adopted the report altogether, and cannot then except to the report, without special leave for that purpose obtained from

cepted to.

the Court (f).

Four days to except to Master's report.

By the time allowed in procedure, the exceptant has four days after the filing of the report, within which he may file and set down exceptions thereto, and serve the order for setting down the same, before the scandal or impertinence is expunged. If he does not do so, the scandalous or impertinent matter is to be expunged (g). It would seem, however, that a party may take exceptions to the report, at any time before (h) the impertinent matter is actually expunged. If, therefore, any delay takes place in proceeding to expunge the impertinence, the plaintiff may avail himself of that delay to file his exceptions, even though the four days have expired (i).

As this is the first occasion upon which it has been necessary to refer to the time allowed in procedure, it is convenient to state here some general rules upon the subject concerning the manner in which such periods are to be computed.

By the 11th Order of May, 1845, when any limited time, from or after any date or event, is appointed or allowed for doing any act or taking any proceeding, the computation of such limited time is not to include the day of such date, or of the happening of such event, but is to commence at the beginning of the next following day, and the act or proceeding is to be done or taken at the latest on the last day of such limited time, according to such computation.

The 12th Order of May, 1845, directs that when the time for

(d) 1 Turn. & V. 781. (e) As to the form of exceptions to the Master's report, see Pearson v. Knapp, 1 M. & K. 312; Woods v. Woods, 10 Sim. 197.

(f) Holmes v. Corporation of Arundel, 3 Beav. 303.

(g) 16th Order, May, 1845, Art. 8. (h) Craven v. Wright, 2 P. Wms.

(i) Evans v. Owen, 2 M. & K. 382.

ought to be struck out of the record, for this reason, that the error on one side is irremediable, on the other not. See Davis v. Cripps, 2 Younge & Coll. (N. R.) 443; Story Eq. Pl. § 267.

doing any act or taking any proceeding is limited by months not expressed to be calendar months, such time is to be computed by lunar months of twenty-eight days each.

Scandal and Impertinence.

By the 13th Order, when the time for doing any act or taking any proceeding, expires on a Sunday or other day on which the offices are closed, and by reason thereof such an act or proceeding cannot be done or taken on that day, such act or proceeding is, so far as regards the time of doing or taking the same, to be held to be duly done or taken, if done or taken on the day on which the offices shall next open.

By the 41st of the same Orders, upon the expiration of four days from the filing of the Master's report, that any pleading or other matter is scandalous or impertinent, the officer having the custody or charge of the pleading, or other matter, is, upon production to him of an office copy of the Master's report, and a certificate that no exception thereto was filed, or an affidavit that no order to set down any such exception was served within four days after the filing thereof, to expunge from such pleading or other matter, such parts thereof as the Master has found to be scandalous or impertinent; and thereupon the person or party requiring such scandalous or impertinent matter to be expunged, is to pay to the officer expunging the same, the same fee as on the like occasion has heretofore been paid to the Master; and by the 42nd Order, it is provided, that the Master is to direct by whom costs, consequent upon the reference, are to be paid.

With respect to the time within which it is competent to a de-Bill referred fendant to object to a bill, on the ground of scandal or imperti- for scandal at nence, a distinction exists between scandal and impertinence; for it has been held that a bill may be referred for scandal in any Secus, for imstage of the suit (k), but that, for mere impertinence, a reference pertinence after order for cannot be obtained after the defendant has answered, or submit-time. ted to answer, by obtaining an order for time (1). It is to be noticed that in Lady Abergavenny v. Lady Abergavenny (1), Lord King discharged an order obtained for referring a bill for scandal after answer, intimating that it should be observed as a rule for the future not to refer a bill for scandal after the defendant had

⁽k) Anon. 5 Ves. 656, Fenhoulet v. M. & C. 545. Passavant, 2 Ves. 24; Anon. ib. 631; see also Beaven v. Waterhouse, 2 Beav. 58; and Petty v. Langdale, 4

⁽l) 2 Peere Wms. 311; vide etiam Anon. 2 Ves. 631.

⁽¹⁾ Ayckbourne Ch. Pr. (Lond. ed. 1844) 197, 198; 1 Smith Ch. Pr. (2nd Am. ed.) 569, 570; Anon. 5 Sumner's Vesey, 656 and cases cited in notes; Story Eq. Pl. § 270.

Scandal and refused to answer it (m). His Lordship's determination to alter Impertinence. the old practice of the Court in this respect does not appear to have been adhered to (n).

By the recent Orders of 1845, an additional remedy has been provided for the prevention of impertinence; for by the 122d Order, if upon the hearing of any cause, petition or motion, the Court is of opinion, that any pleading, petition, or affidavit which has not been referred for impertinence, or any part of any such pleading, petition, or affidavit, is improper or of unnecessary length, the Court may either declare such pleading, petition, or affidavit, or any part thereof, to be improper or of unnecessary length, or may direct the taxing Master to look into such pleading, petition, or affidavit, and distinguish what parts or part thereof are or is improper or of unnecessary length, and may direct the taxing Master to ascertain the costs occasioned to any party by such parts or part thereof as in the one case may have been declared to be; and in the other case may have been distinguished as being, improper or of unnecessary length, and may make such order as is just for the payment, set-off, or other allowance of such costs.

#### SECTION V.

### Of the Form of a Bill.

HAVING thus endeavored to point out the matter of which a bill in Equity ought to consist, it remains to direct the reader's attention to the form which is generally considered requisite in every well drawn bill.

Usually of nine parts.

The form of an original bill commonly used, according to the analysis of Lord Redesdale (o), consists of nine parts, some of which, however, are not essential, and may be used or not at the discretion of the person who prepares it (p).

- I. The first parts consists of the address to the person or persons holding the Great Seal.
- II. The second part contains the names and addresses of the parties complainant.
- (m) Vide acc. Jones v. Langham, Astley, Bunb. 304. nnb. 53. (o) Lord Red. 43. Bunb. 53. (n) Anon. 2 Ves. 631; Anon. 5 Ves. 656; vide etiam, Woodward v. (p) Ibid. 47.

III. The third part contains a statement of the plaintiff's case, Form of origand is commonly called the stating part of the bill.

inal Bill.

- IV. The fourth consists of a charge that the defendant unlawfully confederates with others to deprive the plaintiff of his right.
- V. The fifth part alleges that the defendants intend to set up a particular sort of defence, the reply to which the plaintiff anticipates, by alleging certain facts which will defeat such defence. This is usually termed the charging part, from the circumstance that the plaintiff's allegations are usually introduced by way of charge instead of statement.
- VI. The sixth part contains a statement that the plaintiff has no remedy without the assistance of a Court of Equity, which is termed the averment of jurisdiction.
- VII. The seventh part is the interrogating part, in which the stating and charging part are converted into interrogatories for the purpose of eliciting from the defendant a circumstantial discovery upon oath of the truth or falsehood of the matters stated and charged.
- VIII. The eighth part contains a prayer for relief, adapted to the circumstances of the case.
- IX. The ninth part consists of a prayer that process may issue. requiring the defendant to appear and answer the bill, to which sometimes is added a prayer for a provisional writ, such as an injunction or a ne exeat regno, for the purpose of restraining some proceedings on the part of the defendant, or of preventing his going out of the jurisdiction till he has answered the bill.

And as against some of the defendants this part now sometimes contains a prayer that such parties may, upon being served with a copy of a bill, be bound by all the proceedings in the cause (r).

The Orders of August, 1841, have also rendered necessary what may be considered as a tenth part of a bill, for by the 17th of these Orders it is now directed that the interrogatories which each defendant is required to answer, should be specified in a note at the foot of the bill, which note it is expressly ordered shall be considered and treated as a part of the bill (s).

These several component parts of a bill will form the subject of the present section. It is to be observed, however, that in drawing bills, some of them are frequently omitted, and that others are not absolutely necessary. Thus the fourth, or that part accusing the defendant of unlawful confederacy, is sometimes left

⁽r) 23rd Order, August, 1841.

⁽s) 18th Order, August, 1841.

Address of the out, in amicable suits especially; and in bills against peers of the realm, the insertion of such a charge is considered highly improper. The fifth, or charging part of the bill, is also frequently omitted; and the sixth, or averment that the complainant has no remedy without the assistance of the Court; and the seventh, or interrogating part, are not absolutely necessary (t).

# 1. Address of the Bill (1).

Address of the

Every bill must be addressed to the person or persons who have the actual custody of the Great Seal at the time of its being filed; unless the seals are in the Queen's own hand, in which case the bill must be addressed " To the Queen's Most Excellent Majesty in her High Court of Chancery "(u).

when Lord Chancellor himself sues.

If the Chancellor or Lord Keeper himself be the suitor, he must in like manner direct his bill to the Queen (x), but all other persons must direct their bills to the Lord Chancellor, &c., not to mention the Master of the Rolls himself (y).

Upon every change in the custody of the Great Seal, or alteration in the style of the person holding it, notice of the form in which bills are to be addressed is generally put up in the Record and Writ Clerk's Office.

# 2. Names and Addresses of the Plaintiffs.

Must be correctly stated.

It is not only necessary that the names of the several complainants in a bill should be correctly stated, but the description and

(t) Cowp. Eq. Pl. 10. (u) 2 West Symb. 194, b. (z) Vin Ab. 385. L. Jud. in Ch. 44, 255, 258. Jud. Auth. M. R. 182. Lord Red. 8 In 1 Prax. Alm. 561, is a precedent of a bill by Ld. Chancellor Jefferies addressed to the King's Most Excellent Majesty, and praying his Majesty to grant the usual process of Subpana; and in vol. 2 of the same book, 453, is to be found an answer to the same bill. The final

decree in such cases is, " By the King's Most Excellent Majesty in his High Court of Chancery," and is signed by him. Leg. Jur. in Ch. 256

(y) Vide Leg. Jud. in Ch. 44, where it is stated that in the bundle of Chancery parchments in the Tow-er, there is a bill by Moreton, Keep-er of the Rolls, directed to the Right Rev. Father in God, Robert, Bishop of Bath and Wells.

⁽¹⁾ The first part of a bill is the direction or address of the bill to the Court from which it seeks relief. This address, of course, contains the appropriate and technical description of the Court, and must be varied secondingly. Story Eq. Pl. § 26. In New York the address is, "To the Chancel-lor of the State of New York," without the addition of his name, or any offier title or designation. 1 Barbour Ch. Pr. 35. In Massachusetts the address is, "To the Honorable the Justices of the Supreme Judicial Court, next to be holden," &c.

In the Circuit Courts of the United States the address would be, "To

place of abode of each plaintiff must be set out, in order that the Names, &c. of Court and the defendants may know where to resort to compel obedience to any order or process of the Court, and particularly for the payment of any costs which may be awarded against the plaintiffs, or to punish any improper conduct in the course of the suit (z) (1).

Plaintiffs.

It seems that a demurrer will lie to a bill which does not state Omission of the place of the abode of the plaintiff (a), and that if the bill abode, taken describes the plaintiff as residing at a wrong place, the fact by demurrer. may be taken advantage of by plea (b), though a defendant can-Plea. not put in such a plea, after a demurrer upon the same ground, has been overruled, without leave of the Court (c).

The modern practice, however, in such cases is, not to demur Or motion that or plead to the bill, but to move that the plaintiff may give give security security for costs, and that in the mean time proceedings in the for costs. suit may be stayed (d) (2).

Thus in Simpson v. Burton (e), Lord Langdale, M. R., said, "There can be no doubt, that it is the duty of a plaintiff to state his place of residence truly and accurately at the time he files his bill; and if for the purpose of avoiding all access to him, he wilfully misrepresents his residence, he will be ordered to give secur-I do not think the rule extends to a case, where he has done so innocently, and from mere error."

It is to be observed that, in the case above referred to, there was only one plaintiff, and it does not appear that there is any decision upon the point, where there have been several plaintiffs. is presumed, however, from analogy to the practice where there

- (z) Lord Red. 43. (a) Vide Rowley v. Eccles, 1 S. & S. 511.
  - (b) Ibid. (c) Ibid.

(d) Sandys v. Long, 2 M. & K. 487; see also Bailey v. Gundry, 1 Keen, 53; Campbell v. Andrews, 12 Sim. 578.

(e) 1 Beav. 556; Ker v. Gillespie, 7 Beavan, 269.

the Honorable the Judges of the Circuit Court of the United States, within and for the District of, &c., sitting in Equity." See Equity Rules of the Supreme Court of the United States, Jan. Term, 1842—Rule 20;

Story Eq. Pl. § 26 and note.

(1) Story Eq. Pl. § 26; 1 Smith Ch. Pr. (2nd Am. ed.) 82, 83; Dodge v. Perkins, 4 Mason, 435, cited ante, 360, note.

It is indispensable in all cases where the right to bring the suit in the Courts of the United States is founded on the fact, that the plaintiffs and defendants are citizens of different States, to allege that fact distinctly in the bill. See Bingham v. Cabot, 3 Dall. 382; Jackson v. Ashton, 8 Peters, 148.

⁽²⁾ Howe v. Harvey, 8 Paige, 73; 1 Smith Ch. Pr. (2nd Am. ed.) 557 and note.

Plaintiffs.

Names, &c. of are several plaintiffs, one only of whom is resident abroad (f). that the Court would not in such case require the plaintiff, who is not properly described, to give security: and it is to be noticed. that where a bill is filed on behalf of infants, it is not necessary or usual to describe the infant plaintiff by his place of abode, because an infant is not responsible either for costs or for the conduct of the suit; the description and place of abode of the prochein any must however be set out.

Amount of se curity.

The Order which has been before referred to (g), by which the penal sum in the bond to be given by the plaintiff by way of security for costs is increased from 40l. to 100l., only speaks of cases where the plaintiff is out of the jurisdiction (h). It has, however, been decided, that it applies to the case now under consideration, and to all other cases where security for costs is required (i).

Executor or administrator need not so describe him-

Where a plaintiff sues as executor or administrator, it is not necessary so to describe himself in this part of the bill, though, as we have seen before, it is necessary that it should appear in the stating part that he has proved the will or obtained administration (as the case may be), in the proper Court (k).

Bill by one on behalf of himself and

others.

It is to be noticed here that, where a plaintiff sues on behalf of himself and of others of a similar class, it should be so stated in this part of the bill, and that the omission of such a statement will in many cases render a bill liable to objection for want of parties (1), and in other cases will deprive the plaintiff of his right to the whole of the relief which he seeks to obtain; thus in the case of a single bond creditor sueing for satisfaction of his debt out of the personal and real estate of his debtor, and not stating that he sues "on behalf of himself and the other specialty creditors," he can only have a decree for satisfaction out of the personal estate in a due course of administration, and not for satisfaction out of the real estate (m) (1). And so one judgment-creditor cannot obtain a decree in a suit by himself alone, against the heir of the conusor, for a sale of more than a moiety of the es-

(f) Vide ante 36.

(g) Ante, 39. (h) Ord. 40, 1828.

(k) Ante, p. 363. (l) Ante, Parties, s. 1. (m) Bedford v. Leigh, 2 Dick. 708;

Johnson v. Compton, 4 Sim. 47. If, however, a defect of this description appear at the hearing, the Court will allow the case to stand over, with liberty to the plaintiff to amend. Ib. Biscoe v. Waring, Rolls, 7 Aug. 1835, MS.

i) Bailey v. Gundry, 1 Keen, 53.

⁽¹⁾ Story Eq. Pl. § 100, note.

tate (n), though it is otherwise where there are more judgment- Stating Part. creditors than one (o), or when one sues on behalf of himself and the other specialty creditors.

#### 3. Stating Part.

The third part of a bill contains the statement of the plaintiff's Plaintiff's It is in general correct that the plaintiff's equity should equity must appear in this part of the bill, although there does not seem to be any rule rendering it absolutely necessary that every material fact should precede the charging part of the bill (p) (1).

With respect to the manner in which the plaintiff's case should Facts alleged be presented to the Court, it is to be observed, that whatever is positively; essential to the rights of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively (q); and it has been determined upon demurrer, that it is not a sufficient averment of a fact, in a bill, to state that a plaintiff "is so informed (r);" or to say that one defendant alleges, and the plaintiff believes, a statement to be true (s); nor is an allegation, that the defend-

(n) Stileman v. Ashdown, 2 Atk. (a) Stieman v. Asndown, z. Aus. 477, 608, 610; 1 Amb. 13; S. C. Rowe v. Bant, 1 Dick. 150; Burroughs v. Elton, 11 Ves. 33; O'Gorman v. Cemyn, 2 Sch. & Lef. 150; Higgins v. York Buildings Company, 2 Atk. 107.

(b) Rurroughs v. Elton, supra.

(a) Burroughs v. Elton, supra.

(p) Houghton v. Reynolds,2 Hare, 268.

(q) Lord Red. 41; Darthey v. Clemens, 6 Beav. 166; Munday v. Knight, 3 H. 497.

(r) Lord Uxbridge v. Staveland, 1 Ves. 56.

(s) Egremont v. Cowell, 5 Beav.

Sweetman, 1 Hogan, 29.

The plaintiff will not be permitted to offer or require evidence of any material fact not distinctly stated in the premises. See 2 Story Eq. Pl. 28, 257; Crockett v. Lee, 7 Wheat. 522; Jackson v. Ashton, 11 Peters, 229.

A general charge or statement, however, of the matter of fact is sufficient; and it is not necessary to charge minutely all the circumstances which may and it is not necessary to charge minutely all the circumstances which may conduce to prove the general charge; for these circumstances are properly matters of evidence, which need not be charged in order to let them in as proofs. Story Eq. Pl. § 28. See farther to these points, Dilly v. Heckrott, 8 Gill & John. 171; Morrison v. Hart, 2 Bibb, 4; Lemaster v. Burkhart, 2 Bibb, 26; Crocker v. Higgins, 7 Conn. 342; Buck v. M'Caughtry, 5 Monroe, 220; Bank of U. States, v. Shultz, 3 Ohio, 62; Anthony v. Leftwich, 3 Rand. 263; Boone v. Chiles, 10 Peters, 177; Jackson v. Cartwright, 5 Munf. 314; Aikens v. Bullard, 1 Rice Eq. 13.

But where the facts stated in the bill are disproved, or are defectively state.

But where the facts stated in the bill are disproved, or are defectively stat-

⁽¹⁾ Care must be taken, that the Equity of the plaintiff's case should be fully averred in the stating part of the bill. Story Eq. Pl. § 32; White v. Yaw, 7 Vermont, 357. And that this part of the bill should be full and accurate, for if a plea is put in, the validity of the plea will be decided with reference to the stating part of the bill, and not with reference to the interrogatory part, if it varies from it. Story Eq. Pl. § 27. See Macnamara v. Storestman, 1 Horam, 29.

Stating Part. ant sets up certain pretences, followed by a charge that the contrary of such pretences is the truth, a sufficient allegation or averment of the facts which make up the counter statement (t) (1).

unless those concerning which discoverv sought.

The claims of a defendant may be stated in general terms, and if a matter essential to the determination of the plaintiff's claim is charged to rest within the knowledge of a defendant, or must of necessity be within his knowledge, and is consequently the subject of a part of the discovery sought, a precise allegation is not required (2).

Sufficient must be averred to found decree.

In general, however, a plaintiff must state upon his bill a case upon which, if admitted by the answer, or proved at the hearing, the Court could make a decree (3): and therefore where a bill was filed to restrain a defendant from setting up outstanding terms in bar of the plaintiff's right at Law, not stating that there were any outstanding terms or estates, but merely alleging that the defendant threatened to set up some outstanding terms, or other legal estate, the V. C. of England allowed a demurrer, his Honor being of opinion that a plaintiff who seeks to restrain a defendant from setting up an outstanding term or estate, ought to state in his bill what sort of a term or estate it is (u).

(t) Flint v. Field, 2 Anst. 543; Jones, 3 Mer. 161; Barber v. Hun-Houghton v. Reynolds, supra. ter, cited ib. 170; Frietas v. Dos (u) Stansbury v. Arkwright, 6 Sim. 481. Vide etiam, Jones v. Sandos, 1 Younge & J. 574.

ed, relief may be granted upon the facts stated in the answer. Maury v. Lewis, 10 Yerger, 115; Rose v. Mynatt, 7 Yerger, 30; M'Laughlin v. Daniel, 8 Dana, 184; Dealty v. Murphy, 3 A. K. Marsh. 474. But see Thomas v. Warner, 15 Vermont, 110; Story Eq. Pl § 257, 264; ante, 377, note.

⁽¹⁾ Story Eq. Pl. 255.

Every averment necessary to entitle a plaintiff in Equity to the relief prayed for, must be contained in the stating part of the bill. And where prayed for, must be contained in the stating part of the bill. And where every necessary fact is not distinctly and expressly averred in that part, the defect cannot be supplied by inference, or by reference to averments in other parts. Wright v. Dame, 22 Pick. 55. See to the same point, Harrison v. Nixon, 9 Peters, 503; Shepard v. Shepard, 6 Conn. 57; Mason v. Foster, 3 J. J. Marsh. 284; Leacraft v. Dempsey, 15 Wendell, 83; Yancy v. Fenwick, 4 Hen. & Munf. 423; Mitchell v. Maupin, 3 Monroe, 188; Crocker v. Higgins, 7 Conn. 342; Hobart v. Frisbie, 5 Conn. 592; Blake v. Hinkle, 10 Yerger, 218; Taliaferro v. Foot, 3 Leigh, 58; Hood v. Inman, 4 John. Ch. 437; Rules for the Regulation of Practice in Chancery in Massachusetts. Rule 4: note above next preceding. setts, Rule 4; note above next preceding.

If the bill founds the right against the defendant upon the fact of his hav-

ing notice, it should charge such notice directly; otherwise it is not matter in issue on which the Court can act. Story Eq. Pl. § 263, and cases in note.

⁽²⁾ Story Eq. Pl. § 255. (3) Crockett v. Lee, 7 Wheat. 522; Story Eq. Pl. § 257.

Although the rules of pleading in Courts of Equity, especially Stating Part. in the case of bills, are not so strict as those adopted in Courts of How far tech-Law, yet, in framing pleadings in Equity, the draftsman will do nical expreswell to adhere as closely as he can to the general rules laid down sions should be in the books which treat of Common Law pleadings, whenever such rules are applicable to the case which he is called upon to present to the Court; " for there can be no doubt that the stated forms of description and allegation which are adopted in pleadings at Law, have all been duly debated under every possible consideration, and settled upon solemn deliberation, and that having been established by long usage, experience has shown them to be preferable to all others for conveying distinct and clear notions of the subject to be submitted to the Court," and if this be so at Law. there appears to be no reason why they should not be considered as equally applicable to pleadings in Courts of Equity, in cases where the object of the pleader is to convey the same meaning as that affixed to the same terms in the ordinary Courts. Thus as Seisin in fee, at Law, if a man intends to allege a title in himself to the inheri- how alleged. tance or freehold of lands or tenements in possession, he Possession of a ought regularly to say that he is seised; or if he allege posses- term of years. sion of a term of years, or other chattel real, that he is post-things state sessed (x); if he allege seisin of things manurable, as of lands, able; tenements, rents, &c., he should say that he was seised in his demesne as of fee; and if of things not manurable, as of an advow- not manurable. son, he should allege that he is seised as of fee and right, omitting his demesne (y); so there seems to be no reason why the same forms of expression should not be equally proper in stating the same estates in Equity. It is indeed the general practice in all Words to enwell-drawn pleadings to insert them, although they are frequently large meaning. accompanied with other words, which are sometimes added by way of enlarging their meaning and of extending them to other than mere legal estates, or for the purpose of laying the ground for interrogatories to be put to the defendant in a subsequent part of the bill. Thus in stating a seisin in fee, the words "or otherwise well entitled unto," &c., are frequently added, although it would seem that in some cases the addition of these words would be incorrect, and might render the allegation too uncertain (z).

In recommending the use, in pleadings in Equity, of such tech- Technical exnical expressions as have been adopted in pleadings at Common pressions not

ject-matters beside that to which the essary. pleading relates. Beck v. Beverley, 11 M. & W. 845.

⁽z) 1 Tidd, 41. (y) Ibid And in reciting a statute in pleading at Common Law, the whole of its title must be stated, . though it comprise several other sub-

⁽z) Baring v. Nash, 1 V. & B. 551.

Stating Part. Law, it is not intended to suggest that in Equity the use of any particular form of words is absolutely necessary, or that the same thing may not be expressed in any terms which the draftsman may select as proper to convey his meaning, provided they are adequate for that purpose; all that is contended for is, that notwithstanding the looseness with which pleadings in a Court of Equity may, consistently with the principles of those Courts, be worded, yet, where it is intended to express things for which adequate legal or technical expressions have been adopted in pleadings at Law, the use of such expressions will be desirable, as best conducing to that brevity and clearness which appear formerly to have belonged to pleadings in Equity, and which it has been the object of several Orders of the Court to restore and enforce (a). Assuming, therefore, that even in pleadings in Equity the same form of words as are used in pleadings at Law may generally be introduced with advantage, the reader's attention will here be directed to some of the rules adopted in legal pleadings, which may with good effect be adopted in Equity.

Legal effect only of deeds should be stated.

Thus it is a rule in pleading at Common Law that the nature of a conveyance or alienation should be stated according to its legal effect, rather than its form of words (b) (1). Therefore in pleading a conveyance for life with livery of seisin, the proper form is to allege it as a demise for life, for such is its effect in proper legal description. So a conveyance in tail is, on the same principle, always pleaded as a gift in tail, and a conveyance of the fee with livery, is described by the word enfeoffed; and such would be the form of pleading whatever might be the words of donation used in the instrument itself, which in all the three cases are frequently the same (c). So in a conveyance by lease and release, though the words of the deed of release be "grant, bargain, sell, alien, release and confirm," yet it should be pleaded as a release only, for that is its legal effect. Likewise a surrender (whatever words are used in the instrument) must be pleaded with a sursum reddidit, which alone, in pleading, describes the operation of a

⁽a) Beames's Ord. 27, 70, 166. (b) Stephen on Pleading, 311.

⁽e) Ibid.

⁽¹⁾ See 1 Chitty Pl. (9th Am. ed.) 305; Andrews v. Williams, 11 Conn. 326; Morris v. Fort, 2 M'Cord, 338; Lent v. Padelford, 10 Mass. 230; Hopkins v. Young, 11 Mass. 307; Walsh v. Gilmer, 3 Har. & John. 407; Grannis v. Clark, 8 Cowen, 36; Ridgley v. Riggs, 4 Har. and John. 363; Silver v. Kendrick, 2 N. Hamp. 160; Osborne v. Lawrence, 9 Wendell, 135; Crocker v. Whitney, 10 Mass. 320.

conveyance as a surrender (d). Similar methods of expressing Stating Part. the substance of conveyances should also, whenever it is practicable, be adopted in Courts of Equity, and this is in substance enioined by Lord Coventry's order (e), which orders "that bills, answers, replications and rejoinders be not stuffed with repetitions of deeds or writings in hac verba, but the effect and substance of so much of them only as is pertinent and material to be set down, and that in brief and effectual terms (1)."

It may be observed, however, that although it is desirable, in Documents set stating instruments, that the above order should be adhered to, out in hec

and that the substance only of such instruments as are necessary to be set out should be stated without repeating them in hac verba, yet cases may arise in which it is convenient to state written documents in their very words. This occurs whenever any question in the cause is likely to turn upon the precise words of the instru- Where quesment, as in the case of bills filed for the establishment of a par-tion turns upon particular ticular construction of a will which is informally or inartificially words; worded: in such bills the words, which are the subject of the dis- as in wills; cussion, ought to be accurately set out, in order more specifically to point the attention of the Court to them. Indeed, wherever in- or informal informal instruments are insisted on, upon the construction of which struments. any difficulty is likely to arise, as is frequently the case in agreements reduced into writing by persons who have not been professionally educated, or which are insisted on as resulting from a written correspondence, in all such cases the written instruments relied on, or at least the material parts of them, should be set out in hæc verba. So also in bills filed for the purpose of carrying into effect written articles, upon the construction of which, although they are formally drawn, questions are likely to arise, such articles, or so much of them as are likely to give rise to questions. should be accurately stated. In many cases also the expressions of an instrument or writing are such that any attempt to state their substance, without introducing the very words in which they are expressed, would be ineffectual; in such cases also it is best that they should be set forth, and where a deed, or agreement, or other

(d) Ibid.

(e) Beames's Ord. 78. Vide etiam, Lord Clarendon's Orders, ibid. 165-6.

instrument relied upon by the plaintiff has been lost or mislaid and is not forthcoming, it is useful, if it can be done, to set out the contents of the instrument at length, in order to obtain an admission of those contents from the defendant in his answer.

⁽¹⁾ Story Eq. Pl. § 241.

It may be observed here that, according to the old practice of

Stating Part. leaving document with clerk in Court

Old practice of the Court, when a plaintiff wished to obtain from a defendant an admission as to the particular deed or instrument in his (the plaintiff's) own possession, it was usual to leave the deed or other instrument in the hands of the plaintiff's clerk in Court, and, having stated that fact in the bill, to pray that the defendant might inspect it, and after inspection answer the interrogatories applicable to the subject (f). This practice, however has been for a long Discontinued. time discontinued; and it is now considered sufficient to state upon the bill the date, parties' names and substance of the deed or instrument relied upon by the plaintiff, and then to require the defendant to set forth whether a deed, of the nature of that set forth, was not duly executed by and between the parties stated, or some, or one, and which of them, and whether the deed does not bear the date, and is not to the purport or effect before set out, or of some, and what other date, or to some, and what other purport and This form of statement and interrogatory is calculated to draw from the defendant either an admission or a denial of the deed, and of all knowledge of it, or of its execution, date and contents, or else a statement of the defendant's knowledge or belief of the parties by whom it was executed, and of its date, tenor, ef-

Where conveyance would be valid at common law deed need not be stated.

fect, &c.

Secus, deed necessary to give effect to transaction.

Regulations introduced by statute do not alter the rule of pleading.

With reference to the subject of stating written instruments, it may be observed that it is a rule in pleading at Law, which may also with propriety be adhered to in Equity, that where the nature of a conveyance is such that it would at Common Law be valid without deed or writing, there no deed or writing need be averred, though such document may in fact exist: but where the nature of the conveyance requires at Common Law a deed or other written instrument, such instrument must be alleged (g). Therefore a conveyance, with livery of seisin, either in fee or tail, may be pleaded without alleging any charter or other writing of feoffment, gift or demise, whether such instrument in fact accompanied the conveyance or not, for such conveyance might at Common Law be made by parol only; and though, by the statute 29 Car. II. c. 3, s. 1, it will not now be valid, unless made in writing, yet the form of pleading remains the same as before the Act of Parliament (A). from the rule which has been adopted that mere regulations introduced by statute do not alter the form of pleading at Common Law (i); from which it results that where an act makes writing

⁽f) Per Lord Eldon in The Princess of Wales v. The Earl of Liverpool, 1 Swan. 123.

⁽g) Stephen on Pl. 312.(h) Ibid. 313.

Ibid. n. 1.

necessary to a matter where it was not so at the Common Law (as in Stating Part. the above case of a possession with livery, or in the case of a lease for a longer term than three years, which is required by the same statute to be in writing, although at Law it might be by parol), it is not necessary to plead the thing to be in writing, though it must be proved to be so in evidence (k). The same rule has been adopted with respect to pleadings in Equity. Thus in stating a Bargain and adopted with respect to pleadings in Exquiry. I has in stating a sale stated conveyance by bargain and sale, it is not essential to state that it without averwas enrolled, for though such a process is rendered necessary by ring enrolstatute, it was not so at Common Law, and so a bill may be brought ment. for an annuity without stating that it was duly registered (1). Up- Annuity withon the same principle, in a bill for the specific performance of an registration. agreement, it is not necessary to state that the agreement was signed, because, before the Statute of Frauds, an agreement was Agreement valid, and might be enforced, although it was not signed; the sig-need not be averred to nature, therefore, was a mere matter of regulation, introduced by have been that statute (1). Upon the same ground it has been held that an signed; action at Law may be brought upon an agreement, without stating it to be in writing (the writing being a circumstance only required or to be in by the Statute of Frauds), although it would be impossible to give writing; any evidence of it upon the trial which is not in writing (1). In Whitchurch v. Bevis (m), Lord Thurlow appears to have entertained a doubt whether a demurrer might not hold to a bill brought to enforce an agreement in Equity, without stating it to be in writing, because the statute says, "that an agreement which is not in writing shall not avail;" and in Redding v. Wilkes (n), his Lordship appears actually to have allowed a demurrer, upon the ground that the bill having set up a parol agreement, the facts which were alleged as part performance were not sufficient to take it out of the statute (2). It is to be remarked, however, that it has been al-

(k) Ibid. 375. (m) 2 Bro. C. C. 559-5 (l) Vide Harrison v. Hogg, 2 Ves. J. 327. (m) 3 Bro. C. C. 401. (m) 2 Bro. C. C. 559-568; and see

Part performance of a contract within the statute of frauds must, in order

⁽¹⁾ See Story Eq. Pl. 762, 253; Cosine v. Graham, 2 Paige, 177; Coles v. Boone, 10 Paige, 535; Ontario Bank v. Root, 3 Paige, 478. See 1 Chitty Pl. (9th Am. ed.) 303, 304; Nelson v. Dubois, 13 John, 177; Cleaves v. Foss 4 Greenl. 1; Wallis v. Frazier, 2 Nott & Mc. 180.

A bill alleging a trust need not show the trust to have been created by writing. Peasley v. Barney, 1 D. Chip. 333. See Hobart v. Andrews, 21 Pick. 526, 534.

⁽²⁾ As to the effect of part performance and what will amount to a part erformance sufficient to take a case out of the statute, see Whitchurch v. Bevis, 2 Bro. C. C. (Perkins's ed.) 566, note (a) and cases cited; Whitbread v. Brockhurst, 1 ib. 404, and cases cited in notes; 2 Story Eq. Jur. § 759-767; Newton v. Swasey, 8 N. Hamp. 9.

Stating Part. most the uniform practice to take advantage of the Statute of Frauds by plea or answer, and not by demurrer; and this circumstance Lord Thurlow himself notices in Whitchurch v. Bevis, and accounts for, from the rule adopted at Law, and above referred to, under which an action might be brought upon an agreement without stating it to be in writing, though it is impossible to give any but written evidence of it at the trial (3).

or stamped.

It is upon the principle above referred to, that although stamping is by sundry Acts of Parliament rendered necessary to the validity of a variety of instruments, it is not necessary, nor is it even usual, in pleadings, to aver that such instruments have been duly stamped.

Letters con-

It may be noticed in this place that where an agreement relied taining agree- upon in a bill is to be collected from the letters between the parconstituting it; ties, the letters may be stated in the bill either as constituting the alleged agreement, or as evidence of an alleged parol agreement.

or as evidence. In the first case the defendant may insist that they do not make out a concluded agreement, and that no extrinsic evidence can be received; in the latter he may plead the Statute of Frauds (o).

> When it is stated that the rule of pleading at Law, which directs that where an Act of Parliament introduces a new regulation with regard to conveyances, &c., which before were complete without such regulation, such conveyances, &c., should be stated without averring a compliance of the regulation, may be adopted in pleadings in Equity; it is by no means intended to assert that the adoption of such rule is always advisable in pleadings in this Court; all that is meant is, that if in such cases the conveyance or agreement is not stated in the bill to be in writing, the omission will not afford ground for a demurrer, and that the objection, if any in reality exists, must be taken either by plea or answer; in fact, it is generally important, in a bill for a specific performance, to state the agreement, &c., to have been in writing, and to have been signed, and thereby to afford foundation for an interrogatory as to those points, in order if possible to establish them by the admission of the defendant, and so save the expense of proving them by other evidence.

> It is to be observed, also, that this rule of pleading applies only to cases in which the necessity for a conveyance or agreement be-

(o) Birce v. Bletchley, 6 Mad. 17; 1 Sugd. on Vend. 99.

to entitle a party to relief, be expressly stated in the bill. See Meach v. Stone, 1 D. Chip. 182. (3) See Ontario Bank v. Root, 3 Paige, 478.

ing in writing, is superadded by statute to things which at Com- Stating Part. mon Law might have been by parol; but where a thing is original- Instrument ly created by Act of Parliament, and required to be in writing, it created by must then be stated, with all the circumstances required by the statute stated with all cir-Act (p). Thus a devise of lands (which at Common Law is not cumstances valid, and is authorized only by the statutes 32 Hen. VIII. c. 1, required. and 34 Hen. VIII. c. 5,) must be alleged to have been made in Will of lands must be averwriting, which is the only form in which those statutes authorize red to be in it to be made (q).

writing :

In pleading a devise, however, it is only necessary to set it out but not as duly as having been in writing, which is the form required by the State executed and ute of Wills; for although by the Statute of Wills certain other attested; forms are required to render a devise of freehold property valid, yet as these are mere matters of regulation introduced by statute, a compliance with them is not, upon the principle before laid down, necessary to be alleged in pleading, although it is usual to intro- although duce a statement to that effect.

Some doubt appears to be entertained whether in suits under as to statethe 8 Geo. II. c. 13, and 7 Geo. III. c. 5, by which the property ments under in certain prints is vested in the inventors for a certain number of Acts. years from the day of publishing, it is necessary to state that the name of the engraver and date of the print have been engraved on the print as required by the Act. In Blackwell v. Harper (r), Lord Hardwicke was of opinion that the clause in the Act was only directory, and that the property was vested absolutely in the engraver, so as to entitle him to sue, although the day of publication was not mentioned, and compared it to the clause under the statute of Ann. (s), which requires entry at Stationers' Hall, upon the construction of which it has been determined that the property vests, although the direction has not been complied with. Lord Ellenborough also held, at nisi prius (t), that an action might be maintained, although the proprietor's name was not inscribed; observing that the interest was vested by the statute, and that the Common Law gave the remedy (u). On the other hand, it appears to have been taken for granted by the Court of King's Bench, in the case of Thompson v. Symonds (x), though it became unnecessary to decide the point, that both the name and the date should appear: and in Harrison v. Hogg (v), Lord Alvanley, M. R., stat-

⁽p) Steph. on Plead. 313.

Buller v. Walker, cited 2 Atk. 94. (u) Roworth v. Wilks, 1 Campb.

⁽q) Ibid. (r) 2 Atk. 95; Barn. Ch. Rep. 213.

s) 8 Ann. c. 19. (t) Beckford v. Hood, 7 T. R. 620;

⁽x) 5 T. R. 41. (y) 2 Ves. J. 323.

Stating Part. ed that he differed from Lord Hardwicke, and that it was his opinion that the insertion of the name and date was essential to the plaintiff's right.

Instrument in writing necessary at law must be averred.

It has been before stated, that it is a rule in pleading that whenever at Common Law a written instrument was not necessary to complete a conveyance, it is necessary in pleading to aver it, although such an instrument has been rendered necessary by statute. and has been executed; the converse of this is also a rule, so that whenever a deed in writing is necessary by Common Law it must be shown in pleading; therefore if a conveyance by way of grant

Where things lie in grant.

As tithes.

be pleaded, a deed must be alleged, because matters that " lie in grant," according to the legal phrase, can pass by deed only (z). Thus in Henning v. Willis (a), where the plaintiff filed a bill for tithes, and set up by way of title a parol demise by the impropriator for one year, the defendant demurred for want of title in the plaintiff, and the plaintiff submitted to the demurrer. same ground, in Jackson v. Benson (b), where the bill prayed an account of tithes, and merely stated that the impropriate rector demised the tithes to him, a demurrer put in by the defendant, was considered to be well founded; and in Williams v. Jones (c), the same objection was taken at the hearing, and would have prevailed, had it not appeared that the impropriators had originally been made parties to the suit, but had been dismissed in consequence of their having disclaimed all interest in the tithes in question (d).

Reference to instruments;

makes them part of record but not evidence.

It may be noticed here that, in stating deeds or other written instruments in a bill, it is usual to refer to the instrument itself, in some such words as the following, viz. " as in and by the said indenture, reference being thereunto had, when produced will more fully and at large appear." The effect of such a reference is to make the whole document referred to part of the record. be observed that it does not make it evidence: in order to make a document evidence, it must, if not admitted, be proved in the usual way; but the effect of referring to it is to enable the plaintiff to rely upon every part of the instrument, and to prevent his being precluded from availing himself, at the hearing, of any portion, either of its recital or operative part, which may not be inserted in the bill, or which may be inaccurately set out. Thus it seems that a plaintiff may, by his bill, state simply the date and general

⁽z) Steph. on Pleading, 313.
(a) 3 Wood. 29.
(b) M'Cleland, 62; 13 Pri. 131.

⁽c) 1 Younge, 252.

⁽d) Vide ante, 259.

purport of any particular deed or instrument under which he Stating Part. claims, and that such statement, provided it is accompanied by a reference to the deed itself, will be sufficient. As in Pauncefort v. Lord Lincoln (e), where the plaintiff's claims were founded on a variety of deeds, wills, and other instruments; but to avoid expense, or for some other purpose, the dates and general purport of the deeds, &c. were stated in the bill, with reference to them. This manner of stating the case does not appear to have been considered as a ground of objection to the bill; but when the cause was brought to a hearing, the Master of the Rolls referred it to the Master to state the rights claimed by the plaintiff under the several deeds, &c. mentioned in the bill, and reserved costs and further directions until after the report, and the cause was afterwards heard, and a decree made, on the report which stated the deeds, &c.

It is obvious that the method of stating the plaintiff's title, adopted in the above-mentioned case, was one of great inconvenience; and although it has been referred to here, it is by no means from a wish to recommend its adoption as a precedent. It is always necessary in drawing bills to state the case of the plaintiff clearly, though succinctly, upon the record; and in doing this, care should be taken to set out precisely those deeds which are relied upon, and those parts of the deeds which are most important to the case.

Although in bills in Equity the same precision of statement that Of the certainis required in the pleadings at Law is not attainable (1), yet it is ty required. absolutely necessary that such a convenient degree of certainty should be adopted as may serve to give the defendant full information of the case which he is called upon to answer (2). Cresset v. Mitton (f), Lord Thurlow observed, "special pleading depends upon the good sense of the thing and so does pleading here; and though pleadings in this Court run into a great deal of unnecessary verbiage, yet there must be something substantial:" and in Lord Redesdale's Treatise it is said, that the rights of the several parties, the injury complained of, and every other necessary circumstance, as time, place, manner, or other incidents, ought to be plainly yet succinctly alleged. And in the case of Wormuld v. De Lisle (g), Lord Langdale allowed a demurrer to

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⁽e) 1 Dick. 362. (f) 1 Ves. J. 449; 3 Bro. C. C. (g) 3 Beav. 18; see ante, p. 409.

⁽¹⁾ See Droullard v. Baxter, 1 Scam. 192. (2) Story Eq. Pl. § 240 et seq. General General certainty is sufficient in pleadings in Equity. Story Eq. Pl. § 253.

Stating Part. a bill on the ground of the vagueness and uncertainty of its state-

Of the certainty required in

With respect to the allegation of time, it is to be observed that, alleging time; where it is material (1), it ought to be alleged with such a degree of accuracy as may prevent any possibility of doubt as to the period intended to be defined. Thus in prescribing for a modus in a bill, it is necessary that a time for the payment of it should be mentioned (A); and, formerly, it appears to have been considered that not only the day of payment should be mentioned, but that laying the day of payment on or about a particular day was too uncertain (i). It has however been decided that, in ordinary cases, the laying of an event on or about a certain day of a certain mouth or year, is a sufficient specification of time. In the case of Leigh v. Leigh (k), the bill prayed that the defendant might be restrained from setting up a term of 500 years, in bar of an action of ejectment which the plaintiff had brought against the present possessor, and alleged that the plaintiff's title accrued on the death of an individual named, which happened on or about the 2nd of July, 1806. The defendant demurred on the ground that the period alleged in the bill, as the time of the death of the individual named, was more than twenty-one years (the period required by stat. 3 & 4 Will. IV. c. 27, s. 2 & 24, to bar suits) before the filing of the bill, which took place in 1824. When the demurrer was first argued, the V. C. of England was of opinion that the words, on or about the 2nd July, 1806, did not fix any precise date, and that it might mean many years before, or many years after that time; and overruled the demuserer. Upon appeal, however, the Lords Commissioners, Pepys and Bosanquet, reversed the decision, being of opinion that from the known and accepted use of the expression, "on or about," in all the ordinary transactions of life, it was sufficiently definite for all the purposes of demurrer, and did satisfactorily set out the fact, that the person named died in the year, 1896 (1).

and other incidents;

With respect to the certainty required, in setting out the other incident in the plaintiff's case, the following cases will serve to show what degree of it is required under the circumstances to which they refer: In the case of Cresset v. Mitton (m), before alluded

⁽h) Goddard v. Keeble, Bunb. 105;

Phillips v. Symes, ib. 171.

(i) Blacket v. Finney, Bunb. 198.

(k) Before the Lords Commission-

ers, Aug. 6 & 8, 1835.

⁽¹⁾ See also Richards v. Evans, 1 Ves. 39; Roberts v. Williams, 12 East, 33.

⁽m) 1 Ves. J. 449; 2 Bro. C. C. 480.

⁽¹⁾ On the subject of the materiality of time, see Seton v. Slade, 7 Sumner's Vessy 265, Perkins's note (b); Marquis of Hertford v. Boore, 5 ib. 719, note (a) and cases cited; 2 Story Eq. Jur. § 776 and notes.

to, a bill had been filed to perpetuate testimony to a right of com- Stating Part. mon and of way, and it stated "that the tenants, owners and occu- in bills to espiers of the said lands, messuages, tenements and hereditaments, in tablish a right right thereof, or otherwise, have, from time whereof the memory of of way; man is not to the contrary, had, and of right ought to have, &c." To this bill a demurrer was put in; one of the grounds for which was, that it was not stated as to what messuages in particular the rights of common and of way were claimed; and, in allowing the demorrer, Lord Thurlow said, "you have not stated whether the right of way and common is appurtenant and appendant to the land, &c. that you hold; and you state it loosely that you have such right as belonging to your estate, or otherwise, so that your hill is to have a commission to try any right of common and way whatever" (1). The same doctrine appears to have been held by Lord Keeper North, in Gell v. Haywood (n), who upon a bill to perpetuate the testimony of witnesses touching a right of way, held, that in such a bill the way ought to be laid exactly per et trans, as in a declaration at Law. And so, in Ryves v. Ryves (o), where a bill was filed for a discovery of title-deeds, relating to lands in the possession of the defendants, and for the delivery of the possession of in bills for the such lands to the plaintiff, &c., upon a loose allegation, that, un-delivery up of der some deeds in the custody of the defendants, the plaintiff was entitled to some interest in some estates in their possession, but without stating what the deeds were, or what the property was to which they applied, a demurrer was allowed (2).

Upon the same principle, in bills to establish a modus, or other customary payment, in lieu of tithes, a considerable degree of accuracy is required in setting out the modus; thus, if it is a modus applicable only to a particular portion of lands in a parish, as in the case of an ancient farm, the quantity and boundaries of the lands covered by the modus ought to be stated, in order that the rector may know what the particular lands are in respect of which the exemption is claimed (p). In this respect there is a great difference between the mode of stating a modus in a bill and in an answer, much more precision being required in the former than in the lat-

⁽n) 1 Vern. 312. (o) Ves. 343; see also Loker v. Rolle, 3 Ves. 4; and East India Co. framed in a very loose way.

v. Henchman, 1 Ves. J. 287, where upon demurrer Lord Thurlow gave (p) Scott v. Allgood, 4 Gwil. 1369; 1 Anst. 16, S. C.

to the plaintiff leave to amend on the sole ground that the bill had been

Story Eq. Pl. § 244, 395; Jerome v. Jerome, 5 Conn. 352. (2) Story Eq. Pl. § 245.

Stating Part.

ter, where it is merely set up as a defence; and the Court of Exchequer has carried this distinction so far, as to say, that though it was impossible to establish a modus, as laid in a cross-bill, in consequence of the want of sufficient accuracy in describing the farms alleged to be covered by it, yet it was a very different consideration whether the modus, as laid in the answer to the original bill, from which the statement in the cross-bill was copied, might not afford such a defence as would prevent the plaintiff from having a decree The reason of this distinction appears to be befor an account (q). cause a landholder who endeavors to establish a modus is bound to know what his claim is, before he brings it into Court, and is therefore tied down to an accurate statement of it; but, in an answer, a tenant is bound, within a limited time, to show whether he has any defence to make or not, and if he give such a statement as will inform the plaintiff of the general nature of the case to be brought against him, it will be sufficient (r).

Certainty required in bills to restrain the setting up outstanding terms;

The principle which requires a sufficient degree of certainty in the statement of a bill, has been further illustrated in the case of Stansbury v. Arkwright (s), before referred to, where a bill to restrain a defendant from setting up outstanding terms in bar to the plaintiff's claim at law, was held to be demurrable to, on the ground that it did not allege what sort of term or estate was outstanding.

in bills for relief on the ground of error;

The rule which prescribes that a plaintiff shall not sustain a bill unless he has employed such a degree of certainty in setting out his case as may enable the defendant to ascertain the precise grounds upon which it is filed, applies to all cases in which a person comes to a Court of Equity for relief upon a general allegation of error, without specifying particulars (t); and if a party, seeking to open a settled account, files his bill without such a specification of errors, he will not be permitted to prove them at the hearing, even though the settlement of the account is expressed to be, errors excepted, which is the usual form observed in settling accounts (u) (1).

---- to open settled accounts;

(q) Scott v. Allgood, supra; Athyns
v. Lord Willoughby de Brooke, 4
Gwil. 1412.
(r) Baker v. Athill, 4 Gwil. 1423;
2 Anst. 491, S. C.
(s) Ante, 355.
(t) Taylor v. Haylin, 2 Bro. C. C. 310; 1 Cox, 435, S. C.; Johnson v.
Curteis, 3 Bro. C. C. 266.
(u) Ibid.

^{(1) 1} Story Eq. Jur. § 523, 527; Story Eq. Pl. § 800, 251; Calvit v. Markham, 3 How. (Miss.) 343; Mebane v. Mebane, 1 Ired. Eq. 403; De Montmorency v. Devereux, 1 Dru. & Wal. 119; Leaycraft v. Dempsey, 15 Wendell, 83; Baker v. Biddle, 1 Bald. 394, 418; Bainbridge v. Wilcocks, ib. 536, 540; Consequa v. Fanning, 3 John. Ch. 587; S. C. 17 John. 511; Taylor v. Haylin, 2 Bro. C. C. (Perkins's ed.) 311, note (a) and cases cited; John.

And it should be noticed that where a plaintiff files a bill for a Stating Part. general account, and the defendant sets forth a stated one, the where defenplaintiff must amend his bill, because a stated account is prima dant sets up facie a bar till the particular errors in it are assigned (x) (1). stated account: or an award. Upon the same ground it has been held that an award is a bar to a bill brought for any of the matters intended to be bound by it, and that if a bill is filed to set aside the award as not being final, &c., the specific objections to it must be stated upon the bill (y).

It is to be remarked that in most of the cases above cited, the Objection question has come before the Court upon demurrer, which seems murrer. to be the proper way in which a defendant ought to take the objection that a bill is deficient in certainty; the question, whether, in case the defendant omits to avail himself of this method of objection, and puts in an answer, he can be admitted at the hearing to insist upon the same sort of exactness in statement, which he might have insisted upon had he demurred, was the subject of discussion in a case before Lord Redesdale, in Ireland (z). filed to set aside a decree of foreclosure which had been made in the absence of the mortgagor, in pursuance of the statute (7 Geo. II. c. 14, Irish), " for making the process in Courts of Equity more effectual against mortgagors who abscond, and cannot be served therewith," &c., upon the ground that the mortgagor came within the eighth section of the Act, which saves the right of infants, persons of non-sane memory, &c., and it was merely charged in the bill that the mortgagor "was of a weak and feeble understanding, approaching almost to idiocy," though it was proved by the evidence, that he was incapable of managing his affairs. Lord Redesdale at first appeared to think that, although the allegation would not have been sufficiently precise to support the bill had it been demurred to, yet as it had not been objected to in that manner, and as the evidence showed that the plaintiff was a person of extremely weak understanding, he was warranted in admitting it. His Lordship observed, "but it may be said that the bill not having stated with sufficient precision the degree of incapacity which the Act requires, the fact of 'non-sane memory,' within the Act, was not in issue in the cause. This is a point which has a little disturbed my mind, and, before I finally decide, I should like to consider how

⁽z) Dawson v. Dawson, 1 Atk. 1. (z) Carew v. Johnston, 2 Sch. & Lef. 280. (y) Routh v. Peach, 2 Anst. 519.

son v. Curtis, 3 ib. 267, note (a); Brownell v. Brownell, 2 ib. 63, note (a). But see Shugart v. Thompson, 10 Leigh, 434.
(1) Story Eq. Pl. § 798.

Stating Part. far this loose manner of stating, in bills in Equity, will warrant the Court in receiving the evidence offered. 1 wish on many accounts that pleadings in Equity were more precise than they are; at the same time it is to be considered that they will not admit of the same precision as pleadings at Law. If, indeed, a defendant in Equity puts in a plea, considerable precision is required, because he seeks to reduce his case to one point. If, on a bill filed, to carry this decree into execution against the heir, he had pleaded that the person against whom the decree was made was 'a person of weak mind and almost an idiot,' I should have held that a bad plea, as a plea, although it might have stood for an answer; but whether the same sort of exactness is necessary, in the statement in a bill to which no demurrer is put in, is a question to be considered." His Lordship, however, said afterwards, that as to whether the case was within the Act of Parliament, he rather thought he could not bring it within it; and it is to be observed, that though he subsequently gave judgment in favor of the plaintiff's right to set aside the decree. it was not upon the ground of the mortgagor having come within the saving section of the Act, but because the decree appeared to have been fraudulently obtained by taking advantage of the mortgagor's imbecility of mind. Little, therefore, can be collected from that case against the defendant's right to make the same objection for want of certainty in the allegation of the bill, at the hearing, that he might have done by demurrer.

#### 4. Charge of Confederacy.

This part of the bill contains a general charge that the defendant "combining and confederating with divers persons, at present unknown to the plaintiff, but whose names when discovered the plaintiff craves to be at liberty to insert in his bill, with apt and proper matter and words to charge and make them parties defendants to the bill," refuses to do that justice to the plaintiff which he requires or is entitled to. This charge, although generally introduced in a bill, is not necessary (1); and may be, and in amicable suits frequently is, omitted (a). The practice of inserting it is said to have arisen from an idea that, without such a charge, additional parties could not be added to the bill by amendment; and in some cases the charge has been inserted with the view to give the Court jurisdiction (b). But it is quite certain that, in

Not usual in amicable suits. Origin of the practice.

⁽a) Prac. Reg. 63.

⁽b) Lord Red. 40.

⁽¹⁾ See Barton, 33, note (1); Cooper Eq. Pl. 10; 1 Hoff. Ch. Pr. 41.

cases where the charge is not introduced, parties may be added by amendment, and also that the Court has jurisdiction without such allegation (c) (1).

Confederacy.

Upon this subject, Lord Redesdale observes, that it has been, Defendant deprobably for this reason, generally considered that a defendant multifariousdemurring to a bill, comprising persons whose interests are so dis-ness; tinct that they ought not to be made parties to the same bill, ought to answer the bill so far as to deny the charge of combination. It has been decided, however, that an answer to a charge of un-need not deny lawful combination cannot be compelled (d); and that a charge of unlawful of lawful combination, to render it material, ought to be specific: combination: for where persons have a common right, they may join together nor of lawful in a peaceable manner to defend that right, and though some of unless distinctthem only may be sued, the rest may contribute to their defence ly alleged. at their common charge (e); and if on the ground of such a combination the jurisdiction of a Court of Equity is attempted to be sustained, where the jurisdiction is properly at Common Law, the combination ought to be specially charged, that it may appear to warrant the assumption of jurisdiction in a Court of Equity (f).

From whatever cause the practice of charging combination has Combination arisen, it is still adhered to, except in the case of a peer, who is against a peer. never charged with combining with others to deprive the plaintiff of his right, either with respect to the peerage, or, perhaps, from an apprehension that such a charge might be construed into a breach of privilege (g).

⁽c) Cowp. Eq. Pl. 14. (d) Oliver v. Haywood, 1 Anst. 82.

⁽f) Lord Red. 41. (g) Lord Red. 41.

⁽e) Hob. 92.

⁽¹⁾ Story Eq. Pl. § 29.

Although the charge of confederacy is now usually, but not invariably, inserted in bills, yet it is treated as mere surplusage; so much so, that it is said, that the general charge of combination need not be (although it usually is) denied or responded to in the answer, when charged in the bill; for it is mere impertinence. Story Eq. Pl. § 29.

By the 21st rule of the Equity Rules of the Supreme Court of the United States. In Term 1849, it is provided that the plaintiff shall be at liberty to

States, Jan. Term, 1842, it is provided that the plaintiff shall be at liberty to omit at his option the part which is usually called the common confederacy clause of the bill, averring a confederacy between the defendants to injure or defraud the plaintiff.

By the 4th rule of the Rules for the Regulation of Practice in Chancery in Massachusetts, it is provided that the common charge of fraud or combination shall be omitted, except in cases where it is intended to charge fraud and combination specifically.

Charging Part.

#### 5. Charging Part (1).

Origin of its introduction;

for what purpose.

It was formerly the practice, of pleaders in Equity, to state the plaintiff's case in the bill very concisely, and then if any matter was introduced into the defendant's plea or answer, which made it necessary for the plaintiff to put in issue, on his part, some additional fact in avoidance of such new matter, such new fact was placed upon the record by means of a special replication. In order to avoid the inconvenience, delay, and unnecessary length of pleading, arising from this course of proceeding, the practice now in use has been introduced, and wherever the plaintiff is aware at the time of filing his bill, of any defence which may be made to it, and has any matter to allege which may avoid the effect of such defence, the course now is to insert, after the general charge of confederacy, an allegation that the defendants pretend, or set up such and such allegations by way of defence, and then to aver the matter used to avoid it in the form of charge. This is commonly called the charging part of the bill, and its introduction into practice has, in all probability, led to the discontinuance of special replications, by enabling the plaintiff to state his case, and to bring forward the matter to be alleged in reply to the defence at the same time, and that without making any admission, on the part of the plaintiff, of the truth of the defendant's case. Thus if a bill be filed on any equitable ground, by an heir who apprehends his ancestor has made a will, he may state his title as heir, and alleging the will by way of pretence on the part of the defendants claiming under it, make it a part of his case without admitting it.

May be omitted. It has been before stated, that the charging part of a bill may be, and frequently is, omitted (1); to which it may be added that, in Partridge v. Haycraft (h), Lord Eldon said that "Lord Kenyon never would put in the charging part, which does little more than unfold and enlarge the statement;" and certainly, where such is

(h) 11 Ves. 575.

⁽¹⁾ The form of such a charge is given in Van Heythuysen's Equity Draftsman, page 5, and in Barton, page 34; Story Eq. Pl. § 31, 33 and notes.

⁽²⁾ Story Eq. Pl. § 33, 32, 32 a, and note. By the Equity Rules of the Supreme Court of the United States, the plaintiff is at liberty to omit, at his option, what is commonly called the charging part of the bill, setting forth the matters or excuses which the defendant is supposed to intend to set up, by way of defence to the bill. Equity Rules of the Sup. Ct. U. S. Jan. Term, 1842, Rule 21.

the only object for its introduction, it may be very properly omitted. In many cases, however, its introduction is highly beneficial, not only for the purpose of introducing matter which would formerly have been the subject of a special replication, but as a foundation for interrogatories which may lead to a discovery of the defendant's case (k), and likewise afford grounds for collateral inquiries and directions in the decree which may not necessarily arise out of the case as mainly insisted upon in the bill, but which, in the event of partial success, either on the part of the plaintiff or defendant, may become necessary, but which without some allegation or charge to warrant them in the pleadings could not be introduced (l) (1).

It is to be observed that a charge in the bill, that the defendant Allegation of a pretends that a certain fact has taken place, sufficiently puts that pretence sufficient in issue (2); and that where a bill had been filed by one of the matter in five residuary legatees for an account of the estate of a testator, issue. and for payment of her fifth part, alleging that one of the defendants pretended that the plaintiff's share of a certain bequest of stock was lapsed, and a decree had been pronounced, reserving that share to the defendant when she should come of age; upon a second bill being filed by the same plaintiff and her husband for the above legacy, the former decree, signed and enrolled, was pleaded in bar; and it was held by Lord Hardwicke, that the allegation, in the original bill, of the pretence that the legacy was

(k) Lord Red. 44.

(l) Holloway v. Millard, 1 Mad. 414.

(1) See Aiken v. Ballard, Rice Eq. 13; M'Crea v. Purmort, 16 Wendell, 460; Hawley v. Wolverton, 5 Paige, 522; Mechanics Bank v. Levy, 3 Paige, 606; Stafford v. Brown, 4 Paige, 88.

sought. Stafford v. Brown, 4 Paige, 88.
(2) Story Eq. Pl. § 31. See Parker v. Carter, 4 Munf. 273; 1 Hoff. Ch. Pr. 42.

If the plaintiff wishes to obtain a discovery of facts to anticipate and rebut the defence which may be set up by the defendant, he should in the charging part of the bill state the anticipated defence as a pretence of the defendant, and then charge the real facts to lay a foundation for the discovery which is sought. Stafford v. Brown. 4 Paige, 88.

[&]quot;Another very important rule," says Mr. Justice Story, "as to the frame of bills, seems now established in England; and that is, if the bill means to rely upon any confessions, conversations or admissions of the defendant, either written or oral, as proof of any fact charged in the bill, (as, for example, of fraud,) the bill must expressly charge what such confessions, conversations or admissions are, and to whom made, otherwise no evidence thereof will be admitted at the hearing." "Whether the like rule will be allowed to prevail in America, may be deemed open to much doubt." See Story Eq. Pl. § 265 a, and the cases cited in notes, for a more full statement of the rule and the reasons of it. In Smith v. Burnham, 2 Sumner, 612, it was held that the confessions, admissions and conversations of the defendant need not be expressly charged in a bill in Equity, in order to entitle the plaintiff to use them in proof of facts charged, and in issue therein.

Charging Part. lapsed, was sufficient to put the point in issue in that cause, and that the plaintiff was as much bound by the decree against her as if there had been a specific declaration upon the point that she was not entitled (m) (1).

#### 6. Averment of Jurisdiction (2).

THE sixth part of the bill is intended to give jurisdiction over the suit, to the Court, by a general averment that the acts complained of are contrary to equity, and tend to the injury of the plaintiffs, and that they have no remedy, or not a complete remedy, without the assistance of a Court of Equity (2) (3). It is to be observed, however, that this averment alone will not give the Court jurisdiction, unless a case be shown, in the bill, from which it is apparent that the jurisdiction properly belongs to it (o). The omission of this clause, therefore, will not render the bill defective (4).

# 7. Interrogating Part (5).

Framed to elicit answer upon oath.

THE bill having shown the title, of the persons complaining, to relief, and that the Court has the proper jurisdiction for the purpose, in the seventh place, prays, in the form or to the effect directed by the 19th Order of August, 1841, That the said defendants may, if they can show why your orator should not have the relief hereby prayed, and may upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct, and perfect answer make to such of the

(m) Gregory v. Molesworth, 3 (n) Lord Red. 44. Atk. 626. (o) Ibid.

⁽¹⁾ If the bill is sworn to, it is perjury for the plaintiff knowingly to make a false charge or averment in the charging, as much as if he makes a false statement in the stating part. Smith v. Clark, 4 Paige, 368.

(2) For the form of this averment, see Story Eq. Pl. § 34, in note.

(3) It need not be stated, in a bill, that there is not an adequate remedy

at law; it is sufficient if it appear, from the facts disclosed in the bill, that such remedy does not exist. Botsford v. Bears, 11 Conn. 369.

⁽⁴⁾ At best, the clause is a mere superfluity. Story Eq. Pl. § 34. See 21st of the Equity Rules of the Sup. Court of the U. States, Jan. Term,

²¹st of the Equity Rolles of the Sup. Court of the C. States, Jan. 1842. See also ante, 359, note.

(5) Story Eq. Pl. § 35–39, and notes.

A bill which wholly omits the interrogatory part, is said to be defective in Shedd v. Garfield, 5 Vermont, 39. But it is not regarded as absolutely necessary by Mr. Justice Story, Eq. Pl. § 38, though often highly useful to sift the conscience of the defendant, and almost universal in practice. Ib.

several interrogatories hereinafter numbered, and set forth as by Interrogating the note hereinafter written, they are respectively required to answer: that is to say.

- 1. Whether, &cc.
- 2. Whether, &c.

and the interrogatories which each defendant is required to answer, ought to be specified in a note at the foot of the bill (p) (1); it is not, however, necessary to number every question in any case (q), and as the only object of the order is to limit a defendant's answer to that portion of the interrogatories which applies to him, it does not seem in a case where there is only one defendant to be absolutely necessary to prefix any number (r).

This answer, in the case of ordinary persons, is required by When outh the bill to be upon oath, although the plaintiff may afterwards, if dispensed with he thinks proper, dispense with this ceremony, by consenting to, or applying for, an order to that effect (s). The answer of a cor-Answer of corporation aggregate is required to be under their common seal; poration under and where a defendant is entitled to privilege, the answer is required upon the honor of the defendant only, and the oath is dispensed with (t). This privilege of the peerage, as well as all others, — of a peer. except that of sitting in the House of Lords, extends to all Irish and Scotch peers, unless the former have waived their privileges by accepting seats in the House of Commons (u).

Before the Orders of August, 1841, a defendant who submitted

(p) 17th Order, Aug. 1841. (q) Boutcher v. Branscombe, 5 Beav. 541.

(r) Lynch v. Lecesne, 1 H. 627.

(s) Lord Red. 10, 11. (t) Ibid. (u) Robinson v. Lord Rokeby, 8 Ves. 601. The privilege of peerage, which entitles a peer to answer upon his attestation of honor instead of his oath, does not appear to be of very ancient standing, and is traced no higher than the 16th of Elizabeth, Gilb. For. Rom. 48, and it does not appear to have been established till a much later period, for it was contested and refused by Lord Chancellor Egerton. (Treat. on Star Chamber,

p. 3, s. 10; vide 2 Coll. Jur. 168; Toth. 10, 11), who said that the hon-or of a peer did not bind his conscience any more than if he should be permitted to give evidence to a jury at Law, upon honor, where, if the jury found, contrary to the evidence, no attaint world lie against them. But this privilege has been since fully established by an order of the House of Lords in 1640, by which it was ordered that the nobility of this kingdom, and Lords of the up-per house of Parliament, and the widows and dowagers of the temporal lords, should answer upon honor only. Cowp. Eq. Pl. 15.

⁽¹⁾ The same rule has been adopted by the Supreme Court of the United States. 41st rule of the Equity Rules of the Sup. Ct. of the U.S. Jan. Term, 1842; Story Eq. Pl. § 847, note.

Part.

Interrogating to answer, was obliged to answer all the allegations and charges in the bill, which might be material to the plaintiff's case; and although, to prevent evasion on the part of the defendant, it was usual to add interrogatories concerning the matters considered to be most essential, yet an answer was open to exception; if it omitted to notice material effects in the bill concerning which no specific interrogatories were introduced (1). Now, however, a defendant is not bound to answer any statement or charge in the bill, unless there is a special and particular interrogatory thereto founded upon it, nor need he answer any interrogatory, unless he is individually required so to do by the note at the foot of the bill: and when a defendant does answer any statement or charge to which he is not interrogated only by stating his ignorance concerning it, such answer is deemed impertinent (z) (2); as the object of the interrogatory part is to compel an answer to such facts only as are material to the plaintiff's case, it is necessary that every interrogatory should be founded upon statements made in the former part of the bill. Therefore, if there is nothing in the prior part of the bill to warrant an interrogatory, the defendant is not compellable to answer it (y); a practice necessary for the preservation of form and order in pleadings, and particularly to keep the answer to the matters put in issue by the bill (z). But a variety of questions may be founded on a single charge, if they are relevant to it (2). Thus, if a bill is filed against an executor for an account of the personal estate of his testator, upon the single charge that he has proved the will, may be founded every inquiry which may be necessary to ascertain the amount of the estate, its

Many questions asked on single charge or allegation.

> general v. Whorwood, 1 Ves. 534-538. (x) 16th Order, August, 1841. (y) Ibid. Vide etiam, Attorney-

(z) Lord Red. 46.

States. 40th rule of the States, Jan. Term, 1842. 40th rule of the Equity Rules of the Supreme Court of the United

(2) Story Eq. Pl § 37.

⁽¹⁾ The general interrogatory, or requisition in the bill, "that the defendant may full answer make, to all and singular the premises, fully and particularly, as though the same were repeated, and he specially interrogated, &c." is sufficient to entitle the plaintiff to a full disclosure of the subject-matter of the bill, equally as if he had specially interrogated the defendant to every fact stated in the bill. Meth. Episcopal Church v. Jaques, I John. Ch. 65. Such is the rule in Massachusetts. Rules for the Regulation of Practice in Chancery, Rule 5. And by Rule 4th it is required that the bill shall conclude with a general interrogatory. But the plaintiff may, when his case requires it, propose specific interrogatories; and may allege, by way of charge, any particular fact, for the purpose of putting it in issue. Ib.

(2) This same rule has been adopted by the Supreme Court of the United States. 40th rule of the Equity Rules of the Supreme Court of the United

value, the disposition made of it, the situation of any part remain- Interrogating ing undisposed of, the debts of the testator, and any other circumstances leading to the account required (a). This rule is stated and acknowledged by Lord Eldon, in Faulder v. Stuart (b), where a defendant declined, by his answer, setting forth the particulars of a certain consideration, which it was alleged in the bill the defendant pretended was paid by him for the purchase of a share in a newspaper, which was the subject of the litigation. His Lordship, upon exceptions to the Master's report upon the sufficiency of the answer being argued before him, said, "It all all depends upon this, whether there is such a charge in the bill as to the payment of the consideration as entitles the plaintiff to an answer, not only whether it was paid, but as to all the circumstances, when, where, &c. I have always considered that a general charge enabled you to put all questions upon it that are material to make out whether it was paid; and it is not necessary to load the bill by adding to the general charge that it was not paid, that so it would appear if the defendant would set forth when, where, &c. The old rule was, that making that substantive charge, you may in the latter part of the bill ask all questions that go to prove or disprove the truth of the fact so stated (c)."

It is to be observed, however, that the interrogatories must in Must be conall cases be confined to the substantive charge or allegation, and fined to charge that the plaintiff cannot extend his interrogatories in such a manner as to compel a discovery of a distinct matter not included in the allegation or charge (1); and therefore, where a bill prayed a discovery in aid of an action at Law under the Stock Jobbing Act (d), as to an advance, by plaintiff to the defendant, of a sum of money without legal consideration, which it was alleged in the bill, was advanced as the premium for liberty "to put upon, detain or refuse stock," or in consideration of certain contracts relating to stock which are void under that Act, and the defendant denied by his answer that the plaintiff did advance or pay to the defendant the sum mentioned, or any other sum as the premium. &c. (as charged in the bill,) to which answer an exception was taken because the defendant had not negatived the receipt of the money in every way which had been suggested in the interrogato-

⁽a) Ibid. (b) 11 Ves. 296.

⁽c) 11 Ves. 296. (d) 7 Geo. II. c. 8.

⁽¹⁾ James v. M'Kernon, 6 John. 543; Woodcock v. Bennett, 1 Cowen, 734; Mechanics Bank v. Levy, 3 Paige, 606; Consequa v. Fanning, 3 John. Ch. 596.

Part.

Interrogating ry, Lord Eldon overruled the exception, because the interrogatory pointed at a case within the fifth and eighth sections of the Act, in respect of which no bill of discovery was given by the Act. whereas the allegations in the bill related to cases within the first section of the Act, in respect of which a right to file a bill of discovery was given by the second section (e).

If not founded upon allegation and answered, matter

It may be noticed here that, in Attorney-general v. Whorwood (f), where interrogatories in a bill were directed to partieular facts which were not charged in the preceding part, and the is put in issue. defendant, though not bound to answer them, did so, and the answer was replied to; Lord Hardwicke held that the informality in the manner of charging was supplied by the answer, and that the facts were properly put in issue; "for a matter may be put in issue by the answer as well as by the bill, and, if replied to, either party may examine to it" (g) (1).

## 8. The Prayer for Relief.

Two-fold: for special relief.

The prayer for relief is generally divided into two parts, viz., the prayer for specific relief, and the prayer for general relief (2).

Although there is no doubt, but that a mere prayer for general relief would, in most cases, be sufficient to enable the plaintiff to obtain such a decree as his case entitles him to (A), yet it is the

- (e) Bullock v. Richardson, 11 Ves. 373.
  - (f) 1 Ves. 534. (g) Ibid. 538.

(h) Cook v. Martyn, 2 Atk. 3; Grimes v. French, ibid. 141; Partridge v. Haycraft, 11 Ves. 570-574; Wilkinson v. Beal, 4 Mad. 408.

(1) Story Eq. Pl. § 36.
(2) The latter can never be properly and safely omitted; because, if the plaintiff should mistake the relief, to which he is entitled, in his special plaintiff should mistake the relief, to which he is entitled, in his special prayer, the Court may yet afford him the relief to which he has a right, under the prayer of general relief, provided it is such relief as is agreeable to the case made by the bill. Mitford Eq. Pl. by Jeremy, 38, 45; Coop. Eq. Pl. 13, 14; English v. Foxall, 2 Peters, 595; Colton v. Ross, 2 Paige, 396; Driver v. Fortner, 5 Porter, 10; Thomason v. Smith, 7 Porter, 144; Peck v. Peck, 9 Yerger, 301; Isaacs v. Steel, 3 Scam. 104.

Relief not specifically prayed; is within the general relief. Beaumont v. Boultbee, 5 Summer's Vessey, 485; Story Eq. Pl. § 41, note. This, though a general rule, is not universal. As when an injunction is wanted, a special prayer is necessary. Story Eq. Pl. § 41; Eden, Injunc. (2nd Am. ed.) 73, 74; 2 Story Eq. Jur. § 862, 863; Walker v. Devereaux, 4 Paige, 248. If there is no prayer of general relief, then if the plaintiff should mistake the relief to which he is entitled, no other relief can be granted to him, and his suit must fail, at least unless an amendment of the prayer is obtained.

his suit must fail, at least unless an amendment of the prayer is obtained. Story Eq. Pl. § 41; Driver v. Fortner, 5 Porter, 10; Thomason v. Smith, 7 Porter, 144; Peck v. Peck, 9 Yerger, 301. For a form of prayer for relief in a bill, see Story Eq. Pl. § 40 note, 41 note; Colton v. Ross, 2 Paige, 396, and cases there cited.

usual and most convenient practice to precede the request for re- Prayer for Relief, generally, by a statement of the specific nature of the decree which the plaintiff considers himself entitled to under the circumstances of his case (1).

This part of the bill, therefore, should contain an accurate spe- Deficiency cification of the matters to be decreed; and, in complicated cases, supplied under the framing of it requires great care and attention (2); for, al- eral relief. though where the prayer does not extend to embrace all the relief But such relief to which the plaintiff may at the hearing show a right, the defi-sistent with cient relief may be supplied under the general prayer, yet such relief specifirelief must be consistent with that specifically prayed, as well as and case made with the case made by the bill, for the Court will not suffer a de-by bill. fendant to be taken by surprise, and permit a plaintiff to neglect and pass over the prayer he has made, and take another decree, even though it be according to the case made by his bill (3).

A particular prayer for relief, although very proper and convenient, is not essential, since under a general prayer for relief a plaintiff may pray at not essential, since under a general prayer for relief a plaint: ff may pray at the bar a specific relief not particularly prayed for in the bill, if otherwise entitled to the same. Wilkinson v. Beal, 4 Madd. 408; Cook v. Martyn, 2 Atk. 2; Grimes v. French, 2 Atk. 141; Colton v. Ross, 2 Paige, 396; Foster v. Cooke, 1 Hawks, 509; Lloyd v. Brewster, 4 Paige, 537; Lingan v. Henderson, 1 Bland. 252; Dsiver v. Forner, 5 Porter, 10; Thompson v. Smithson, 7 Porter, 144; Peck v. Peck, 9 Yerger, 301; Allen v. Coffman, 1 Bibb, 469; Wilkin v. Wilkin, 1 John. Ch. 111; Cook v. Mancius, 5 John. Ch. 89; Brown v. M'Donald, 1 Hill, 302; Gibson v. M'Cormick, 10 Gill & John. 66; Townsend v. Duncan, 2 Bland. 45; Marine and Fire Ins. &c. v. Early, R. M. Charlt. 279; Repplier v. Buck, 5 B. Monroe, 96, 98; Thomas v. Hite, 5 B. Monroe, 593.

The relief given under the general prayer must be agreeable to the case made by the bill. Story, Eq. Pl. § 41; Chalmers v. Chambers, 6 Har. & John. 29; Hobson v. M'Arthur, 16 Peters, 182; Read v. Cramer, 1 Green Ch. 277; Franklin v. Osgood, 14 John. 527; English v. Foxall, 2 Peters, 595; Kibler v. Whiteman, 2 Harr. 401. For the Court will grant such relief only as the case stated will justify, and will not ordinarily be so indul-

lief only as the case stated will justify, and will not ordinarily be so indullief only as the case stated will justify, and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially, if the defendant may be surprised or prejudiced thereby. If therefore the plaintiff doubts his title to the relief he wishes to pray, the bill should be framed with a double aspect, so that, if the Court should decide against him in one view of the case, it may yet afford him assistance in another. Story Eq. Pl. § 42; Mitford Eq. Pl. by Jeremy, 38, 39; Colton v. Ross, 2 Paige, 396; Lloyd v. Brewster, 4 Paige, 537; Walker v. Devereaux, 4 Paige, 229; Foster v. Cook, 1 Hawks, 509; Lingan v. Henderson, 1 Bland. 252; Pleasants v. Glasscock, 1 Smedes & Marshall, 17, 24, 25; Kibler v. Whiteman, 2 Harrington, 401; Bebee v. Bank of New York, 1 John. 559.

And where there is no obstruction to the particular relief prayed, the plain-

And where there is no obstruction to the particular relief prayed, the plaintiff cannot abandon that, and ask a different decree under the general prayer. Allen v. Coffman, 1 Bibb, 469; Pillow v. Pillow, 5 Yerger, 420.

⁽²⁾ Story Eq. Pl. § 43.

(3) Foster v. Cooke, 1 Hawks, 509; Colton v. Ross, 2 Paige, 396; Chalmers v. Chambers, 6 Har. & John. 29; Gibson v. M'Cormick, 10 Gill & John. 66; Townsend v. Duncan, 2 Bland. 45; King v. Rossett, 2 Younge & Jer. 33. But see, contra, Bailey v. Benton, 8 Wendell, 339; 1 Hoff. Ch. Pr. 49 and note; Read v. Cramer, 1 Green, Ch. 277; next preceding note above.

elect.

Prayer for Re- Therefore, in Soden v. Soden (i), where a bill was filed against Declaration that defendant had elected. not granted, under prayer that he may

No decree of foreclosure under prayer for sale.

- nor decree for land under prayer for annuity.

Account of rents and profits not directed under a prayer for specific performance by vendor.

Specific performance of an proved;

a woman to compel her to elect between the provision made for her by a will, and that to which she was entitled under a settlement, and the case made by the bill was solely calculated to call upon her to elect, Lord Eldon held, that a declaration that she had elected, so as to conclude her, could not be maintained under the prayer for general relief, being inconsistent both with the case made by the bill, and with the specific prayer that she should make her election. And so where a bill (k) was filed by a person in the character of mortgagee, praying a sale under a trust, to which it appeared he was not entitled, the Court would not permit him, under the general prayer, to take a decree that the defendant might redeem or be foreclosed, although it was the relief which properly belonged to his case (1). And in like manner, where a bill was brought for an annuity or rent-charge under a will, and the counsel for the plaintiff prayed at the bar that they might drop the demand for the annuity and insist upon the land itself, Lord Hardwicke denied it, because it came within the rule before laid down (1) (2). Upon the same principle, where a vendor filed a bill for a specific performance against a purchaser, who had been in possession, under the contract, for several years, but failed in establishing his right in consequence of a defect in his title, the Court refused, under the prayer for general relief, to direct an account of the rents and profits against the purchaser, although he had stated by his answer that he was willing to pay a fair rent (m). And so where a bill was filed for the specific performance of a written agreement, and parol evidence was read to agreement not prove a variation from it, the bill was dismissed with costs, the decreed where plaintiff not being allowed to resort to the substantial agreement But though in genproved on the part of the defendant (n).

(i) Cited by Lord Eldon in Hiern v. Mills, 13 Ves. 119.

(k) Palk v. Lord Clinton, 12 Ves. 48 [Sumner's ed. note (a)]; vide etiam, Jones v. Jones, 3 Atk. 110.

(1) Grimes v. French, 2 Atk. 141. (m) Williams v. Shaw, 3 Russ.

(n) Legal v. Miller, 2 Ves. 299, vide etiam; Mortimer v. Orchard, 2 Ves. J. 243; Legh v. Haverfield, 5

Ves. 452. Hanbury v. Litchfield, 2 M. & K. 629. But although in such a case the plaintiff cannot have a decree for a different agreement from that set up by his bill, the defendant may have a decree on the agreement such as he has proved it to be. Fife v. Clayton, 13 Ves. 546. The old course required a cross-bill, but the practice now is to decree a specific peformance at the instance of the defendant, upon the offer by the plain-tiff in his bill to perform the agree-ment specifically on his part. Ibid. vide etiam, Gwynn v. Lethbridge, 14 Ves. 585.

⁽¹⁾ A bill was filed to have a mortgage deed recorded, which had been omitted to be recorded within six months, in which was a general prayer for relief. A decree of sale of the mortgaged premises was held not to be within the relief prayed by the bill. Chalmers v. Chambers, 6 Harr. & John. 29.
(2) Story Eq. Pl. § 42.

eral a plaintiff can only obtain the decree he seeks by his bill, the Prayer for Recase of a plaintiff in a suit for tithes is different; for there, though a plaintiff may fail in establishing his right to tithes in kind, he but in suits for may yet have a decree for a modus admitted by the defendant's tithes plaintiff may have a answer (1) ( $\theta$ ). decree for a

The rule, with regard to the nature of the relief which a plain-modus proved by defendant. tiff may have under the prayer for general relief, was laid Plaintiff may down by Lord Eldon, in Hiern v. Mill (p). His Lordship there have relief said, that "as to this point the rule is, that if the bill contains under general charges, putting facts in issue that are material, the plaintiff is the facts which entitled to the relief which these facts will sustain under the gent entitle him eral prayer, but he cannot desert specific relief prayed, and under issue. the general prayer ask relief of another description, unless the facts and circumstances charged by the bill will, consistently with the rules of the Court, maintain that relief (2)." In that case a . bill had been filed by an equitable mortgagee against the mortgagor, and a person who had purchased from him with notice of the incumbrance, and it prayed an account, and in default of payment a conveyance of the estate; and although it charged the purchaser with notice, &c. it did not pray any specific relief against him individually. Lord Eldon, however, thought that the relief asked against him at the hearing was consistent with the case made by the bill, and accordingly decreed an account to be taken of what was due to the plaintiff by the mortgagor, to be paid by the purchaser, who was to have his election to pay the money and keep the estate. And so, in Taylor v. Tabrum (q), where a bill was filed against two trustees, alleging that only one of them had acted in the trusts, and praying relief against that trustee only, to which the two trustees put in an answer, admitting that they had both acted in the trusts, the V. C. of England made a decree against the two, charging them both with the loss occasioned by the breach of trust.

It is to be observed that, in order to entitle a plaintiff to a de-Facts must be cree under the general prayer, different from that specifically in issue to prayed, the allegations relied upon must not only be such as to to relief. afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to re-

⁽o) Cart v. Ball, 1 Ves. 3.

⁽q) 6 Sim. 281.

⁽p) 13 Ves. 119.

⁽¹⁾ Tilghman v. Tilghman, 1 Baldwin, 464; Mortimer v. Orchard, 2 Summer's Vessey, 244, Hovenden's note (3) and cases cited.
(2) Ante, 435, note.

Prayer for Re- lief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed, otherwise the Court would take the defendant by surprise, which is contrary to its principles (1); therefore, where a vendor filed a bill for a specific performance, but, owing to his not being able to make out a title to some part of the property, was unable to obtain a decree for that purpose, it was held that he could not, under the prayer for general relief, obtain an inquiry into the management of the property during the time it was in the vendee's possession, although the bill did contain charges of mismanagement, which, however, had been introduced, not with the view to obtain compensation, but to establish the fact of acceptation of title by the defendant (r) (2).

Frandulent release ordered up on prayer for a general account.

The principle upon which the Courts act, under these circumto be delivered stances, receives considerable illustration from what fell from Lord Redesdale, in Roche v. Morgell (s). The bill in that case stated various dealings between the plaintiff and defendant, imputing fraud and unfair dealing, and various usurious charges, overcharges and mistakes in accounts delivered, and prayed a discovery of the several transactions, and a general account, and also general relief; to this bill the defendant pleaded a release made by the plaintiff, and a question arose, whether, if the release appeared to be founded on a vicious consideration, and was in itself void, the Court could set it aside, there being no specific prayer for that purpose; and Lord Redesdale, in delivering his opinion in the House of Lords upon the point, expressed himself as follows:-"It has been objected that the bill does not state the release, and pray that it may be set aside. It seems doubtful whether the release has been put in issue by the bill; but whether it is so or not, if the release appears to be founded on a vicious consideration, it is in itself void, and the Court need not set it aside, but may act as if it did not exist. The bill prays the general account, and all the relief necessary for the purpose of obtaining that account. This prayer is sufficient. It never was thought of that a bill for an account of fraudulent dealings must especially pray that every

> (r) Stevens v. Guppy, 3 Russ. 171. (s) 2 Sch. & Lef. 721.

tion. Rochester v. Anderson, Litt. Sel. Ca. 146.

⁽¹⁾ Ante, 435, note.
(2) So where a bill was filed for the specific execution of a contract for the purchase of land, alleged to be evidenced by a written memorandum, and that allegation was not sustained by the proof, it was held that the plaining of the proof of the plaining of the proof of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plaining of the plai tiff could not under the prayer for general relief, obtain compensation for improvements upon the lands. Smith v. Smith, 1 Ired. Eq. 83.

On a bill to rescind a contract, the Court cannot decree a specific execu-

bond, every instrument taken by the defendant without sufficient Prayer for Reconsideration, should be set aside. The prayer for general relief is sufficient for that purpose; and upon that prayer the Court may give every relief consistent with the case made by the bill, and continually does give relief in no manner specifically prayed by the bill, and sought for only by the prayer for general relief" (1).

It is to be observed that a Court will not in general decree in-Interest on a terest upon a balance, unless where it is specifically asked for by decreed under the bill (t). Where, however, from peculiar circumstances, inter- general relief. est was not properly due at the time the bill was filed, and a right to interest has subsequently accrued, the Court has, upon further directions, directed interest to be computed, although there was no prayer to that effect in the bill. Thus, in Turner v. Turner (u), interest was, by order on further directions, directed to be computed upon the balance in executors' hands, although not prayed by the bill, because at the time the bill was filed there did not appear to have been any money in their hands, and the bill could not advert to those circumstances which arose subsequently.

Upon the principle, that the Court will not grant a different re- Examination lief from that prayed by the bill, it was held by Sir J. Leach, V. de bene case not permitted C., that where a bill merely prayed a commission to examine wit-under prayer nesses abroad in aid of an action at Law, the Court could not for commission grant a motion, that the plaintiff might be at liberty to examine one of the witnesses, who had come to this country and was about to go away again, de bene esse, but said that the bill might be amended for that purpose (x).

But although the Court will not under the general prayer grant In some cases a different relief from that prayed by the bill, yet when it appears the Court will that the plaintiff is entitled to relief, although it be different from stand over, that which he has specifically prayed, it will sometimes allow the with liberty to cause to stand over, with liberty to the plaintiff to amend his bill. amend prayer. This point was decided by Lord Rosslyn, in Beaumont v. Boultbee (y), in which case it appears that, after publication had been passed, the relief prayed for specifically was thought not to be that to which the plaintiff was entitled. He therefore applied for liberty to amend, by adding an additional prayer for relief, which was resisted upon the ground that the answer put in was applicable to the specific relief already prayed; but, after much discussion,

⁽y) 5 Ves. 485; 7 Ves. 599, S. C. stated on this point, arg. in Palk v. Lord Clinton, 12 Ves. 63; vide etiam, (z) Atkins v. Palmer, 5 Mad. 19.

Where the new party.

Prayer for Re- Lord Rosslyn determined that it was competent to the plaintiff to amend, by adding the additional prayer. In Palk v. Lord Clinton (z), above referred to, it appeared at the hearing that the plainamendment in tiff was not entitled to the specific relief prayed for, and that, troduction of a in order to enable the Court to grant the relief upon the case made by his bill, which might, properly, be given, viz. a foreclosure of the mortgage, it would be necessary to bring an additional party before the Court; an order was made that the plaintiff should be at liberty to amend his bill by adding parties, and praying such relief as he might be advised.

The instances, however, in which this will be done are con-

fined to those where it appears, from the case made by the bill,

Where it appears by the bill that the plaintiff is entitled to relief, though different from that specifically prayed;

but plaintiff cannot make a new case.

that the plaintiff is entitled to relief, although different from that sought by the specific prayer; where the object of the proposed amendment is to make a new case, it will not be permitted. Thus, where a bill was filed for the specific performance of an agreement for a lease to the plaintiff alone, and it was stated, by the defendant's answer, that the agreement had been to let to the plaintiff and another person jointly, but the plaintiff nevertheless replied to the answer, and proceeded to establish a case of letting to himself alone, in which he failed; Lord Redesdale, upon application being made to him, to let the cause stand over, with liberty to the plaintiff to amend, by adding the other lessee as a party, said that such a proceeding would be extremely improper. It was not like letting a case stand over to add a party against whom a decree in a plain case could be made, but for the purpose of making a new case, which it would be if founded on a new agreement (a). In that case, his Lordship stated that the ordinary practice, where a party has mistaken his case, and brings the cause to a hearing under such mistake, is to dismiss the bill without prejudice to a new bill; and this practice was adopted by him in Lindsay v. Lynch (b), and is in accordance with the decree of Sir William Grant, M. R., in Woollam v. Hearn (c), and has been subsequently followed by Lord Lyndhurst, in Stevens v. Guppy (d) (1).

Greater latitude in cases of infants;

But although the Court is thus strict in requiring that where the plaintiff prays specific relief, it must be such as he is entitled to from the nature of the case made by the bill, yet where infants are concerned this strictness is relaxed; and it has been determin-

(z) Ubi supra. (a) Deniston v. Little, 2 Sch. & Lef. 11, n.

⁽b) 2 Sch. & Lef. 1. 7 Ves. 222. (d) 3 Russ. 171.

⁽¹⁾ See Gerrard v. Grinling, 2 Swanst. 250; Story Eq. Pl. § 394 and cases to this point in note.

ed that an infant plaintiff may have a decree upon any matter Prayer for Rearising upon the state of his case, though he has not particularly mentioned or insisted upon it, or prayed it by his bill (e) (1).

In cases of charities, likewise, the Court will give the proper and informadirections, without any regard to the propriety or impropriety in tions for charithe prayer of the information (f).

It sometimes happens that the plaintiff, or those who advise him, Of alternative are not certain of his title to the specific relief he wishes to pray prayer. for; it is therefore not unusual so to frame the prayer that if one species of relief sought is denied, another may be granted. Bills with a prayer of this description, framed in the alternative, are called bills with a double aspect (g) (2).

With respect to the prayer for general relief, although, as has Prayer for genbeen before stated, it may, in most cases, where it is not preceded eral relief. by a specification of the particular relief sought, be made the foundation for a prayer at the bar for the particular relief to which the plaintiff's case may entitle him (3), yet there are cases in

demurrer. Thus in some cases of fraud, where no other relief Not always can be given against a party deeply involved in the fraud charged out a specific by the bill, the payment of the costs of the suit by that party ought prayer.

which it appears necessary that some specific relief should be prayed against the defendant, otherwise the bill will be liable to

to form the subject of a specific prayer; for, unless they are so praved, the Court cannot make an order upon him for payment, and the bill will be liable to a demurrer on his behalf (h).

It is a principle of Equity, that a person seeking relief in Equi- Offer to do ty must do himself what is equitable (4); it is therefore required. equity. in many cases, that a plaintiff should by his bill offer to do whatever the Court may consider necessary to be done on his part to-

(e) Stapilton v. Stapilton, 1 Atk. 2; vide ante, 95. (g) Bennet v. Wade, 2 Atk. 325; Lord Red. 39.

(k) Le Texier v. The Margravine of Anspach, 15 Ves. 159, 164. (f) Attorney-general v. Jeanes, 1 Atk. 355; vide ante, 16 [Story Eq. Pl. § 40 in note].

⁽¹⁾ See the cases cited to this point in note to Story Eq. Pl. § 40. (2) If the plaintiff doubts his title to the relief he wishes to pray, the bill should be framed with a double aspect, so that, if the Court should decide against him in one view of the case, it may yet afford him assistance in another. Story Eq. Pl. § 42; Colton v. Ross, 2 Paige, 396; Lloyd v. Brewster, 4 Paige, 537; Mitford Eq. Pl. by Jeremy, 39; Cooper Eq. Pl. 14; ante, 435, note; M'Connell v. M'Connell, 11 Vermont, 290.

(3) Ante, 435, note.

^{(4) 1} Story Eq. Jur. § 64 c.; Bates v. Wheeler, 1 Scam. 54; Cooper v. Brown, 2 M'Lean, 495; Dougherty v. Humpson, 2 Blackf. 273.

Expries a de-EDINE DE Greene with

Prayer for Be-wards making the decree which he seeks just and equitable, with regard to the other parties to the suit. Upon this principle, where a bill is filed to compel the specific performance of a contract by a defendant, the plaintiff ought by his bill to submit to perform the contract on his part; and it is to be observed that the effect of such submission will be to entitle a defendant to decree, even though the plaintiff should not be able to make out his own title to relief, in the form prayed by his bill (i) (1).

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Upon the same principle, it was formerly required that a bill for an account should contain an offer on the part of the plaintiff to per the balance, if found against him; though it seems that such an offer is not now considered necessary (k) (2). And so, where a surety brought an action upon an indemnity bond against his gracipal, to recover monies which he had been compelled to pay cu his account, and the principal filed a bill in Equity for an inreaction and account of their mutual dealings, suggesting fraud, &c., but without offering to pay what was really due to the defendant, the Court of Exchequer thought, that the want of an offer in the bell to make satisfaction, was fatal to the bill, and allowed a demarrer, which had been put in by the defendant (1).

Bully Berlin ten d:

It is upon the same ground that Courts of Equity, in cases No mile 22 set where a contract is rendered void by a statute, require that a bill to set aside such contract should contain an offer on the part of the plaintiff to pay to the defendant what is justly due to him; so that if a bill be filed, praying that an instrument or security given her an usurious consideration, be delivered up to be cancelled, the cally terms upon which a Court of Equity will interfere are three of the plaintiff paying to the defendant what is bona fide due to him (3); and if the plaintiff does not offer to do so by his

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Stappiton v. Scott, 13 Ves. 425; Fife r. Clayton, ib. 546.

(k) Columbian Government v. Rothschild, 1 Sim. 94, 105. (I) Godbelt v. Watte, 2 Anst 543.

⁽¹⁾ See Story Eq. Pl. § 334, note.
(2) I Smith Ch. Pr. (2nd Am. ed.) 86.
(3) It is against conscience, that the borrower should have full relief, and at the same time pocket the money, which may have been granted at his at the same time pocket the money, which may have been granted at his own mere solicitation. He who seeks equity at the hands of a Court of Equity, may well be required to do equity. 1 Story Eq. Jur. § 301; Fonb. Eq. B. 1, ch. 1, § 3, note (h); Jordon v. Trumbo, 6 Gill & J. 103; Fulton Bank v. Beach, 1 Paige, 429; Crawford v. Harvey, 1 Blackf. 382; M. Daniells v. Barnum, 5 Vermont, 279; Fansing v. Dunham, 5 John. Ch. 142, 143, 144; Rogers v. Rathbun, 1 John. Ch. 367; Campbell v. Morrison, 7 Paige, 158; Judd v. Scaver, 8 Paige, 548; Cole v. Savage, 1 Clarke, 482.

A Court of Equity will not aid a plea of usury, at law, by compelling a Tupper v. Powell, 1 John. Ch. 439; Regers v. Rathbun, 1 John. Ch. 367.

bill, the defendant may demur (m). It seems that there is no Prayer for Redifference in this respect between a cross-bill and an original bill (a) (1). The course of proceedings in bankruptcy, however, Secus, in bankdiffer from those in Courts of Equity; for the rule in bankruptcy ruptcy. is, that a debt made void by statute, (such as a debt or usurious contract,) is void altogether, and cannot be proved at all; and unless the assigness and creditors voluntarily consent to the payment of what is really due, the Lord Chancellor (or Court of Bankruptcy) has not power to order it: and applications of this nature have frequently been refused (e).

It is a rule in Equity, that no person can be compelled to make Waiver of a discovery which may expose him to a penalty, or to any thing in feiture. the nature of a forfeiture. As, however, the plaintiff is, in many cases, himself the only person who would benefit by the penalty or forfeiture, he may, if he pleases to waive that benefit, have the discovery he seeks (p). The effect of the waiver, in such cases, is to entitle the defendant (in case the plaintiff should proceed upon the discovery which he has elicited by his bill, to enforce the penalty or forfeiture), to come to the Court of Equity for an injunction, which he could not do without such an express waiver (a).

It is usual to insert this waiver in the prayer of the bill, and if it is omitted the bill will be liable to demurrer. Upon this ground, where an information was filed by the Attorney-general to discover copyhold lands, and what timber had been cut down and waste committed, &c., and the defendant demurred, because, although the discovery would have exposed the defendant to a forfeiture of the place wasted and treble damages, the Attorney-general had not waived the forfeitures, the demurrer was allowed (r).

(m) Mason v. Gardiner, 4 Bro. C. C. 436; S. C. 1 Fonb. T. Eq. 25; Scott v. Nesbit, 2 Bro. C. C. 641 [see Perkins's ed. notes to this case]; S. C. 2 Cox, 183; Whitmore v. Whitmore v. . C. 2 Cox, 183;

Fyancis, 8 Price, 616.
(n) Mason v. Gardiner, 4 Bro. C.
C. 426, Ed. Belt.

(e) Ex parte Thompson, 1 Atk. 125; Ex parte Skip, 2 Ves. 489; Ex parte Mather, 3 Ves. J. 373; Ex parte Scrivener, 3 V. & B. 14. It does not appear to have been decided what would be the course of the Court in

the case of assignees of a bankrupt being obliged to file a bill in Equity, to set aside a contract on the ground of usury.

(p) In Mason v. Lake, 2 Bro. P. C. 495, leave appears to have been given to amend a bill, by waiving penalties and forfeitures after a de-

murrer, upon that ground allowed.
(q) Lord Uxbridge v. Staveland,
1 Ves. 56.

(r) Attorney-general v. Vincent, Bunb. 192.

(1) Story Eq. Pl. § 630.

So the Court will not allow an answer to be amended for the purpose of setting up the defence of usury, unless the defendant consents to pay the amount actually due. Fulton Bank v. Beach, 1 Paige, 429.

Prayer for Re- And so it has been held that a demurrer will lie to a bill by a reversioner for a discovery of an assignment of a lease without license, if it does not expressly waive the forfeiture (s). Upon the same principle, if a rector or impropriator, or a vicar, file a bill for tithes, he must waive the penalty of the treble value, to which he is entitled by the statute of 2 & 3 Edward VI., otherwise his bill will be liable to demurrer (t). It seems, however, that if the bill pray an account of the single value of the tithes only, such a prayer will amount to an implied waiver of the treble value, and that an injunction may be granted against sueing for the penalty of a treble value, as well upon this implied waiver as upon the most express (u). It is to be observed also, that if the executor or administrator of a parson bring a bill for tithes, he need not offer to accept the single value, as the statute of Edward VI. does not give to such persons a right to the treble value (x).

Waiver unnecessarv when bill prays single value of tithes.

Nor in suits by executors of tithe-owners.

## 9. Prayer for Process.

The ninth part of the bill consists of the prayer for process; it has before been stated that where no account, payment, conveyance, or other direct relief is sought against a party to a suit, who is not an infant, the plaintiff is now enabled, if he thinks fit, to pray by his bill that such a party, upon being served with a copy of the bill, may be bound by all the proceedings in the cause (y); but with respect to all other defendants the process prayed, in ordinary cases, is a writ of subpæna; and this part of the prayer is commonly as follows: -- "May it please your Lordship, the premises considered, to grant unto your orator his Majesty's most gracious writ [or writs] of subpæna, to be directed to the said to the rest of the confederates, when discovered, thereby commanding them, and every of them, at a certain day, and under a pain therein to be limited, personally to be and appear before your Lordship in this honorable Court; and then and there, full, true, direct, and perfect answer make to all and singular the premises; and further to stand to, perform, and abide such further order, direction, and decree therein, as to your Lordship shall seem meet. And your orator shall ever pray, &c." (z).

Subpæna.

⁽s) Lord Uxbridge v. Staveland, ubi supra.

⁽t) Lord Red. 195; Anon. 1 Vern. 60.

⁽u) Wools v. Walley, 1 Anst. 100.

⁽z) Anon. 1 Vern. 60; vide etism, Attorney-general v. Vincent, Bunb. 192.

⁽y) Order, 23rd August, 1841.(z) Hind. 17.

It is to be observed, that the above words are not usually insert- Prayer for Proed in the draft by the draftsman who prepares the bill, although they must be added when the bill is engrossed. The draftsman, however, generally writes a direction, in the margin of the draft, for the insertion of this prayer, specifying the names of the persons against whom process is to be prayed; and care must be taken in so doing to insert the names of all the persons who are intended to be made defendants: because it has been held that the mere naming of a party in a bill, without praying process against him as a defendant, is not to be considered as making him a party (1), even where he is out of the jurisdiction of the Court (a). Some doubt appears to have been thrown upon the last proposition by the decision of Sir J. Leach, V. C., in Haddoch v. Thomlinson (b), in which his Honor expressed an opinion that where a party interested in the subject of a suit is charged by the bill to be out of the jurisdiction of the Court, but is not named in the prayer for process, the omission will not render the record defective; although it is usual and convenient that process should be prayed against them, in order that if they come within the jurisdiction, process may issue against them without amending the bill. In a subsequent case, however, before Sir C. Pepys, M. R., the point again came under the notice of the Court, when his Honor,—after referring to a manuscript report of another case before Sir J. Leach (c), in which that learned Judge had said, that it was not enough to state that persons who, in respect of interest, were necessary parties, were out of the jurisdiction, but that the bill must go on to pray process against them,said that he was of opinion that the principle of the manuscript case ought to be followed, and therefore allowed a demurrer which had been taken ore tenus for want of a necessary party, who had been charged to be out of the jurisdiction, but against

(a) Windsor v. Windsor, 2 Dick.

(b) 2 S. & S. 219.

⁽c) Manos v. De Tastet.

⁽¹⁾ Story Eq. Pl. § 44.

A person, whom the bill prays to be made a party, does not thereby become a party; to make him such, process must be issued and served upon him. Bond v. Hendricks, 1 A. K. Marsh. 594. See Huston v. M'Clarty, 3 Litt. 274; Verplanck v. Merct. Ins. Co. 2 Paige, 438; Lyle v. Bradford, 7 Monroe, 113.

By the practice in New York, parties may be treated as defendants, by a clear statement in the bill to that effect, without praying the subpœns. The reason given is, that in that State the subpœns is issued of course, and that a formal prayer is unnecessary to entitle the plaintiff to process. Brasher v. Van Cortlandt, 2 John. Ch. 245; Elmendorf v. Delancy, 1 Hopk. 555.

Prayer for Pro- whom no process had been prayed when he should come within cess. it (d)(1).

If the defendant be a peer of the realm, or entitled to the privilege of peerage, he has a right before a subpæna is issued against him, to be informed, by letter from the Lord Chancellor, of the bill having been filed; this letter is called a letter missive, and must be accompanied by a copy of the bill. In consequence of this privilege of peerage, the practice is that in all cases, where peers are defendants, the usual prayer for process is preceded by a prayer for a letter missive; in the following words: "May it please your Lordship to grant unto your orator your Lordship's letter missive, to be directed to the said Earl of ____, directing him to appear and answer your orator's said bill, or in default thereof, His Majesty's most gracious writ of subpana, &c." (e).

No person a defendant unless named in prayer for pro cess

It is to be observed, that the privilege which entitles a peer to be served with a letter missive and a copy of a bill instead of a subpæna in the first instance, is not merely a privilege of Parliament, but extends to all persons having a privilege of peerage; and that therefore Scotch and Irish peers are entitled to it, although they have no seat in the House of Lords as representative peers, unless they have waived their privilege by becoming members of the House of Commons (f).

When the Attorney-general is made a defendant to a suit, as he is always supposed to be in Court, the bill does not pray any '

(f) Robinson v. Lord Rokeby, 8 Ves. 601; Lord Milsingtonn v. The Earl of Portmore, 1 V. & B. 419. (d) Taylor v. Fisher, Roll's Sittings after Hil. Term, 1835, MS.; see ante, p. 237.

(e) Hind. 18.

ing the same in the prayer for process."

Provision is made for service of notice on defendants residing out of the Commonwealth, in the Rules for the Reg. of Prac. in Chan, in Massachusetts. Rule 8.

⁽¹⁾ See Story Eq. Pl. § 44 and note; Mitford Eq. Pl. by Jeremy, 165; Milligan v. Milledge, 3 Cranch, 220; Lavihart v. Reilly, 3 Desaus. 590.

The 22nd Rule of the Equity Rules of the Supreme Court of the United The 22nd Rule of the Equity Rules of the Supreme Court of the United States, January Term, 1842, has provided, that "If any persons, other than those named as defendants in the bill, shall appear to be necessary or proper parties thereto, the bill shall aver the reason why they are not made parties, by showing them to be without the jurisdiction of the Court, or that they cannot be joined without ousting the jurisdiction of the Court as to the other parties. And as to persons, who are without the jurisdiction, and may properly be made parties, the bill may pray, that process may issue to make them parties to the bill, if they should come within the jurisdiction." The 23d Rule is as follows: "The prayer for process of subpena in the bill shall contain the names of all the defendants named in the introductory part of the bill, and if any of them are known to be infants under age, or otherwise the bill, and if any of them are known to be infants under age, or otherwise under guardianship, shall state the fact, so that the Court may take order thereon as justice may require, upon the return of the process. If an injunction, or a writ of ne exeat regno, or any other special order pending the suit, is asked for in the prayer for relief, that shall be sufficient, without repeat-

subpæna against him, but merely that, upon being attended Prayer for Prowith a copy of the bill, he may appear and put in an answer

Letters Mis-

For the purpose of preserving the property in dispute pending sive.

Where the Ata suit, or to prevent evasion of justice, the Court either makes a torney-general special order on the subject, or issues a provisional writ; such as is defendant.

the writ of injunction to restrain the defendant from proceeding Prayer for provisional orat Common Law against the plaintiff, or from committing waste ders. or doing any injurious act: the writ of ne exeat regno, to restrain defendant from avoiding the plaintiff's demands by quitting the kingdom, or other writs of a similar nature. When a bill seeks to obtain the special order of the Court, or a provisional writ for any of these purposes, it is usual to insert, immediately before the prayer for process, a prayer for the order or particular writ which the case requires; and the bill is then commonly named from the writ so prayed, as an injunction bill, or a bill for a writ of ne exect regno (h). When an injunction is prayed, the object of it is generally men-

tioned in the specific prayer; and then, after the general prayer, the following words are added before the prayer for process: junction. "May it please your Lordship, the premises considered, to grant unto your orator not only His Majesty's most gracious writ of injunction, issuing out of and under the seal of this honorable Court, to be directed to the said -----, to restrain from proceeding at Law against your orator touching any of the matters in question, but also His Majesty's most gracious writ or writs of subpanas, &c." (i).

As the object of the injunction is generally mentioned in the prayer for relief, these words are not usually inserted in the draft, but are added when the bill is engrossed, in the words of the prayer.

It does not, however, seem to be absolutely necessary, where the injunction sought is merely provisional, that it should be specified in the particular prayer for relief, provided it be prayed in the manner above pointed out; but it is necessary that it should be specially prayed in one part or other, as a proper injunction cannot be granted unless expressly granted by the bill (k); a prayer for general relief will not be sufficient to authorize it (1), for, as

⁽g) Ld. R. 46. Ibid. (i) Hind. 18.

⁽k) Savory v. Dyer, Amb. 70. (1) Wright v. Atkyns, 1 B.&. V.314

Prayer for Pro- against the general words, the defendant might make a different case than he would against a prayer for an injunction (m) (1).

> It is to be observed, that the rule not to grant an injunction, unless specially prayed, applies only to cases where it is required, provisionally, until the hearing, but after decree, the Court will interpose by injunction, although it is not asked for by the bill (n).

> Where an injunction is sought not as a provisional remedy merely, but as a continued protection to the rights of the plaintiff, the prayer of the bill must be framed accordingly (o) (2).

Prayer for ne exeat regno.

The prayer for a ne execut regno, resembles that for an injunction mutatis mutandis, and, like that, it usually precedes the prayer for process (p) (3). But, though it is usual, it is not necessary that the bill should pray the writ, as the intention to go abroad may arise in the progress of the cause; and if, when the bill is filed, the defendant does not intend to leave the kingdom, it would be highly improper to pray the writ; as a groundless suggestion that the defendant means to abscond would press too harshly, and would also operate to create the very mischief which the Court, in permitting the motion for it to be made without notice, means to prevent (q); in the case, however, of Sharp v. Taylor (r), where the plaintiff knew at the time of the filing of the bill, that the defendant was going abroad, the V. C. of England refused to grant a writ of ne exeat regno, in consequence of its not having been prayed for by the bill (s) (4).

(m) Amb. 70.
(n) Wright v. Atkins, ubi supra;
Paxton v. Douglas, 8 Ves. 520;
Jackson v. Leaf, 1 J. & W. 232;
Clarke v. Earl of Ormond, Jac. 122,

and post, Injunction.
(o) Ld. R. 47.

(p) Hind. 18; and Moore v. Hud-

son, Mad. & Gel. 218.

(q) Collinson v. ——, 18 Ves. 353. (r) 11 Sim. 50.

(r) See the case of Darley v. Ni-cholson, 1 Dr. & W. 66; and 2 Dr. & W. 86, for the principles upon which the Court acts in granting suits of ne exect regno.

⁽¹⁾ In cases where the writ of injunction is sought, it should not only be (1) In cases where the writ of injunction is sought, it should not only se included in the prayer for relief, but also in the prayer for process. Story Eq. Pl. § 44; Eden, Injunct. (2nd Am. ed.) 73, 74.

(2) Walker v. Devereux, 4 Paige, 229.

(3) Under the same bill a ne exeat as well as an injunction may be granted. Bryson v. Petty, 1 Bland. 182.

(4) Mitford Eq. Pl. by Jeremy, 46, 47; Story Eq. Pl. § 43 and notes.

#### SECTION VI.

#### In what Cases the Bill must be accompanied by an Affidavit.

THERE are certain cases in which it is necessary that the bill In Suits to obshould be accompanied by an affidavit, to be filed with it, and in which the omission of such accompaniment will render the bill liable to demurrer.

tain benefit of lost instru-

Thus, when a bill is filed to obtain the benefit of an instrument upon which an action at Law would lie, upon the ground that it is lost, and that the defendant cannot therefore have any relief at Law, the Court requires that the bill should be accompanied by an affidavit of the loss of the instrument (s) (1). If, however, the objection is not taken by demurrer, but the cause proceeds to a hearing, and the answer of the defendant admits the loss or destruction of the instrument, then the Court has jurisdiction, and the objection for want of the affidavit will be overruled (t).

So suits for the discovery of deeds and writings, and for relief founded upon such instruments; if the relief prayed be such as might be obtained at Law, on the production of deeds or writings, the plaintiff must annex to his bill an affidavit that they are not in his custody or power, and that he knows not where Secus, where they are, unless they are in the hands of the defendant (2); but a the suit is for a bill for a discovery merely (3), or which only prays the delivery only;

⁽s) Lord Red. 55; Walmsley v. (t) Crosse v. Bedingfield, 11 Sim. Child, 1 Ves. 341; Whitchurch v. 40. Golding, 2 P. Wms. 541.

⁽¹⁾ Pennington v. Governor, 1 Blackf. 78; Taliaferro v. Foote, 3 Leigh, 58; Peart v. Taylor, 2 Bibb, 556; Story Eq. Pl. § 288; Mitford Eq Pl. by Jeremy, 123, 124; Livingston v. Livingston, 4 John. Ch. 294; Le Roy v. Veeder, 1 John. Ch. 417; Munday v. Shatsell, Litt. Sel. Ca. 373; Lynch v. Willard, 6 John. Ch. 342, 346. For the reason of the rule, see post, 453,

In Thornton v. Stewart, 7 Leigh, 128, it was held that, although regularly an affidavit of the loss of the bond, &c. ought to be filed with a bill for y an ammayu or the loss or the bond, etc. ought to be filed with a bill for relief upon a lost bond, yet if such affidavit is not so filed, but is filed afterwards in the progress of the cause, this is sufficient. See Cabell v. Megginson, 6 Munf. 202; Jerome v. Jerome, 5 Conn. 352. For the form of an affidavit in such cases, see 1 Grant Ch. Pr. (2nd ed.) 13.

(2) M'Elwee v. Sutton, 1 Hill Ch. 33; Story Eq. Pl. § 288, 313; Findley v. Hinde, 1 Peters, 244; Livingston v. Livingston, 4 John. Ch. 294.

The English rule requiring an affidavit in cases of lost deeds in not annulus.

The English rule requiring an affidavit in cases of lost deeds, is not applicable to the Chancery practice of Massachusetts, as the court has no jurisdiction, where that is the sole ground alleged in the bill. Campbell v. Sheldon, 13 Pick. 8

⁽³⁾ M'Elwee v. Sutton, 1 Hill Ch. 33; Story Eq. Pl. § 268; Mitford Eq. Pl. by Jeremy, 54.

ment.

struments. or re-execution of cancelled instru-

In Suits to obtain Ben- of deed or writings, or equitable relief grounded upon them, does efit of lost In- not require such an affidavit (u) (1). It is decided in King v. King (x), to be also unnecessary in the case of a bill for discovery of an instrument which has been fraudulently cancelled by the defendant, and to have another deed executed; for in such a case, if the plaintiff had the cancelled instrument in his hands he could make no use of it at Law, and indeed the relief prayed is such as a Court of Equity only can give. The above decision is referred to by Lord Redesdale, in his valuable treatise, as the authority for the position here laid down; but in Roolham v. Dawson (y), its authority appears to have been questioned, and a different decision to have been come to. In that case the bill was filed for the discovery of the contents of a bond which had been given to the plaintiffs, as parish officers, as an indemnification for the expense of a bastard child, and which was alleged in the bill to have been defaced and cancelled by tearing off the signature of the obligor, so that the bond was no longer of force. The bill also prayed an account and payment of what was due on the bond, as well as the execution of a new one for the future indemnification of the trus-To this bill the defendant demurred, "for that the plaintiffs ought, according to the rules of the Court, to have made an affidavit of the bond being defaced and avoided, as stated in the bill," and the demurrer was allowed. It is to be observed, that the Lord Chief Baron Macdonald in his judgment appears to have proceeded upon the ground that the plaintiffs had not confined themselves to seeking a discovery and re-execution of the bond, but had gone on to pray for payment of the sum already due; though certainly that distinction does not appear to have been recognized by the learned Baron Thompson who delivered his opinion upon the occasion. It is, however, submitted that the reason given for the decision in King v. King, and recognized by Lord Redesdale, is quite satisfactory; for as the ground for the interference of a Court of Equity in such a case is not the loss, but the cancellation of the instrument so as to render it impossible to use it at Law, no relief will be granted by the Court until it is satisfied that the cancellation has taken place, by the production of the can-

> (u) Lord Red. 55; Anon. 1 Ves. 380; Whitchurch v. Golding, 2 P. Wms. 541; Anon. 3 Atk. 17; Dormer v. Fortescue, 3 Atk. 132. (x) Mos. 192. (y) 3 Inst. 859.

⁽¹⁾ Where the subject-matter of the writing is properly cognizable in Equity, an affidavit of the loss is not necessary. Peart v. Taylor, 2 Bibb, 566; Mitford Eq. Pl. by Jeremy, 124; Laight v. Morgan, 1 Caines, Ca. Er. 345; S. C. 1 John. Ch. 9.

celled instrument: whereas, in the case of the loss of a document, In Suits under the Court has in general no means of satisfying itself that the document has been lost but the assertion of the party himself, which it consequently requires should be made upon oath.

Another case, in which it is required that the bill should be ac- In suits to limcompanied by an affidavit, is, where a bill is filed under the stat. bility of ship-53 Geo. III. c. 159, which was passed for the purpose of limiting owners under 53 Geo. III. c. the responsibility of shipowners in certain cases. By the first section of the Act, it is declared that no owner of any ship or vessel shall be liable to make good any loss or damage, occasioned without the fault or privity of such owner, which may happen to any goods, wares, merchandize, &c., laden on board any such ship or vessel; or which may happen to any other ship or vessel, or to any goods, wares, merchandize, &c.. on board any other ship or vessel, further than the value of his own ship or vessel; and the freight due, or to grow due for the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage. And by the seventh section it is enacted, that if several persons shall suffer any loss or damage in or to their goods. &c., ships or otherwise, by any means for which the responsibility of the owners is limited by the Act, and the value of the ship or vessel and freight should not be sufficient to make full compensation to all such persons, it shall be lawful for the person liable to make such satisfaction for such damage, or for any one or more of them, on behalf of themselves and the other owners of such ship or vessel, to exhibit a bill in any Court of Equity having competent jurisdiction against all the persons who shall have brought any actions or suit, and all other persons who shall claim or be entitled to any recompense for any loss or damage happening by the same accident or act, to ascertain the amount or value of the ship or vessel's appointments and freight, and for payment and distribution thereof rateably among the several persons claiming recompense, in proportion to the amount of their loss or damage, according to to the rules of Equity. And by the same section it is provided, that the plaintiff or plaintiffs in such bill shall annex to such bill an affidavit that he, she, or they do not directly or indirectly collude with any of the defendants thereto, or with any other owner or owners of the same ship or vessel, or with any other person or persons, but that such bill is filed for the purposes only of justice, and to obtain the benefit of the provisions of the Act; and that the several persons named as the defendants to the said bill are, as the person or persons making such affidavit verily believes, all the persons claiming to be entitled to recompense for loss or damage sustained

In Suits for the by the same accident, act, neglect or default, or on the same occaexamination of Witnesses sion; and that all such defendants do claim such recompense, and de bene esse. to be entitled to proportions of the value of such ship or vessel, appurtenances and freight; and that no other person claims to be entitled to any proportion thereof under the provisions of the Act: and that the amount of the value of such skip or vessel, appurtenances and freight, does not exceed a sum to be specified in such affdavit: and that the several claims made by the defendants to such bill do exceed the amount of the value of such skip or vessel, appurtenances and freight (z). Even in cases in which the legislature has expressly directed that the affidavit should be "annexed to the bill," it is not necessary that the affidavit should be sworn at the same time as the bill is filed, but it is the usual practice in all cases in which an affidavit is necessary to have it sworn a day or two before the bill is filed (a).

In suits to exesse.

The other cases, in which bills are required to be accompanied amine witnes-by an affidavit, may be mentioned here, although they do not come within the description of bills which are now the subject of discus-These are bills for the purpose of examining witnesses, de bene esse, where, from circumstances, such as the age or infirmity of witnesses, or their intention of leaving the country, it is probable the plaintiff would lose the benefit of their testimony; in which case an affidavit of the circumstances, by means of which the testimony may probably be lost, must be annexed to the bill (b) (1); and bills of interpleader, which also, to avoid a demurrer, must be accompanied by an affidavit by the plaintiff that there is no collusion between him or any of the parties (c) (2).

In interpleading suits.

It is to be observed that, in cases of this nature, advantage can

(z) Under this Act, the plaintiff, on filing the bill, must obtain an order for payment of the value of the ship, appurtenances and freight, into Court.

(a) Walker v. Fletcher, 1 Ph. 115. (b) Ld. R. 150; Phillips v. Carew, 1 P. Wms. 117.

(c) Ld. R. 50; Bignold v. Audland, 11 Sim. 23.

(1) Laight v. Morgan, 1 Caines's Cas. in Error, 344; S. C. 1 John. Ca. 429; Story Eq. Pl. § 309, 304.

The reason given for requiring the affidavit is, that the proceeding has a tendency to change the jurisdiction of the subject-matter from a Court of Law to a Court of Equity. Mitford Eq. Pl. by Jeremy, 150, 151; Story Eq. Pl. 309. "This reason," says Mr. Justice Story, "is perhaps not quite satisfactory." "A better ground would seem to be, that the bill has a tendency to create delays, and may be used as an instrument unduly to retard the trial; and therefore an affidavit, that the bill is well founded, is required. The affidavit should be positive as to the material facts." Story Eq. Pl. § 309.

⁽²⁾ Eden on Injunct. (2nd Am. ed.) 401, 402; Shaw v. Coster, 8 Paige, 339; Tobin v. Wilson, 3 J. J. Marsh. 67; Manks v. Holroyd, 1 Cowen, 691; Mitford Eq. Pl. by Jeremy, 143.

only be taken of the omission of an affidavit, by demurrer; and In Suits for the that where a plaintiff, instead of demurring on this ground in the of Witnesses first instance, put in a plea to the whole bill, which was over- de bene case. ruled, he was not allowed to demur ore tenus, on the ground that How omission the necessary affidavit was not annexed (d) (1).

of affidavit taken advantage of.

## SECTION VII.

## Of Filing the Bill.

AFTER a bill has been drawn, or perused and signed by counsel, it must be fairly engrossed on parchment, and it is now neces- How filed. sary that the solicitor should cause to be endorsed or written upon the engrossment his name and place of business, and also (if his place of business shall be more than three miles from the record and writ clerks' office) another proper place, (to be called the address for service,) which shall not be more than three miles from the said office, where suits, notices, orders, communications may be left for him; and where any such solicitor shall only be the agent of any other solicitor, he shall add to his own name or firm and place of business, the name or firm and place of business of the principal solicitor (e).

By another Order (f) it is made necessary that every original information or bill of complaint filed in the High Court of Chancery, shall, at the option of the party, informant, or complainant, by or on whose behalf the information shall be filed, be distinctly marked at or near to the top or upper part thereof either with the words "Lord Chancellor," or with the words "Master of the

(e) 17th Order, Oct. 1842.(f) Order, 1 May, 1837. (d) Hook v. Dorman, 1 S. & S. 227; Crosse v. Bedingfield, 12 Sim.

Such an affidavit is not necessary in Connecticut. Nash v. Smith, 6 Conn. 421. See Jerome v. Jerome, 5 Conn. 352.

See the form of demurrer for want of such an affidavit. Willis, 442; 2 Equity Drafts, (2nd Am. ed.) 77.
(1) Allen v. State Bank, 1 Dev. & Batt. Eq. 6; Findley v. Hinde, 1 Peters, 244.

For the form of demurrer in such cases, see Willis, 431.

An affidavit is required on applications for writs of ne exeat regno. Thorne v. Halsey, 7 John. Ch. 189; Gernoe v. Boccaline, 2 Wash. C. C. 130; Gibert v. Colt. 1 Hopk. 500; Mattocks v. Tremaine, 3, John. Ch. 75; Russell v. Ashby, 7 Sumner's Vesey, 96 and notes. So in cases of injunction. See Campbell v. Morrison, 7 Paige, 157; Bank of Orleans v. Skinner, 9 ib. 305; Hammersley v. Wyckoff, 8 Paige, 72; 1 Barbour Ch. Pr. 617, 618.

ner Filed.

In what man- Rolls." And the record and writ clerks are not to file any original information or bill of complaint which shall not be marked in And it is further necessary that in all informations this manner. or bills marked with the words "Lord Chancellor" the plaintiff shall underneath the words Lord Chancellor write the title of one of the three Vice-Chancellors, at his option, and the cause shall thenceforth, unless removed by some special order of the Lord Chancellor, be attached to such Vice-Chancellor's Court (g).

> The solicitor, having thus prepared the engrossment, delivers it to the clerk of records and writs in whose division the cause is, for the purpose of having it filed. The clerk of records and writs dates it the day that it is brought into his office, numbers it, and receives it into his custody, the bill is then said to be filed, and of record, but before this process is completed it is not of any effect in Court, and persons to be made parties have no right to take copies of it  $(\lambda)$  (1).

## SECTION VIII.

## Of Amending Bills.

In what cases done.

By inserting new matter or parties.

matter or parties.

WHEN a plaintiff has preferred his bill, and is advised that the same does not contain such material facts, or make all such persons parties as are necessary to enable the Court to do complete justice, he may alter it, by inserting new matter subsisting at the time of exhibiting his bill, of which he was not then apprised, or which he did not think necessary to be stated, and may add such By omission of persons as shall be deemed necessary parties; or in case the original bill shall be found to contain matter not relevant, or no longer necessary to plaintiff's case, or parties which may be dispensed with, the same may be struck out (2); and the original bill, thus added to or altered, is termed an amended bill (i).

> (g) I. Order, November, 1841.
>  (k) Beames' Orders, 168 and 110; Order 3, October, 1842. (i) Hind. 21.

⁽¹⁾ In Massachusetts the plaintiff must file his bill before or at the time of taking out the subposns. Rules for the Reg. of Practice in Chancery, Rule 3.

⁽²⁾ Respecting amendments, and when allowed, see Story Eq. Pl. § 884 et seq. and notes, in which will be found the Rules of the Supreme Court of the United States on this subject.

Amendments can only be granted where the bill is defective in parties, or in prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor repugnant thereto. The latter part of this principle applies to all pleadings in

But, although it is the practice to call a bill thus altered an In what cases amended bill, the amendment is in fact esteemed but as a continmay be made. uation of the original bill, and as forming part of it; for both the original and amended bill constitute but one record (k) (1); so Original and amended bill

constitute but one record.

(k) Vere v. Glynn, 2 Dick. 441.

equity, as well as to bills. Verplanck v. Merct. Ins. Co. 1 Edw. 46; Lyon v. Tallmadge, 1 John. Ch. 184; Rogers v. Rogers, 1 Paige, 424; Bowen v. Cross, 4 John. Ch. 375; Renwick v. Wilson, 6 John. Ch. 81.

Being regarded only with reference to the furtherance of justice, amendments, as a general rule, are in the discretion of the Court, especially in matters of mere form. Smith v. Babcock, 3 Sumner, 410; Garlick v. Strong, 3 Paige, 440; McElwain v. Willis, 3 Paige, 506. Amendments are, therefore, always allowed with great liberality, until the proofs are closed, Cock v. Evans, 9 Yerger, 287, except where the bill is upon oath. Cock v. Evans, ubi supra; Cunningham v. Pell, 6 Paige, 655.

In case the bill is upon oath, there is greater caution exercised in reference to amendments, ib.; Verplanck v. Merct. Ins. Co. 1 Edw. 46; Swift v. Eckford, 6 Paige, 22; Lloyd v. Brewster, 4 Paige, 538; Parker v. Grant, 1 John. Ch. 434; Rogers v. Rogers, 1 Paige, 424; Whitmarsh v. Campbell,

2 Paige, 67.
So where the object of the amendment is to let in new facts or defences, there is greater reluctance on the part of the Court to allow the amendment where it depends upon parol proof, than where it depends on written instruments omitted by accident or mistake. Smith v. Babcock, 3 Sumner, 410; Calloway v. Dobson, 1 Brockenborough, 119.

And the Court will not allow amendments by inserting facts known to the plaintiff at the time of filing his bill, unless some excuse is given for the omission. Whitmarsh v. Campbell, 2 Paige, 67; Prescott v. Hubbell, 1

Hill Ch. 217.

When a plaintiff wishes to amend a sworn bill, he must state the proposed amendments distinctly, so that the Court can see that they are merely in addition to the original bill, and not inconsistent therewith. He must also swear to the truth of the proposed amendments, and render a valid excuse for not incorporating them in the original bill; and the application to amend must be made as soon as the necessity for such amendment is discovered. Rogers v. Rogers, 1 Paige, 424; Whitmarsh v. Campbell, 2 Paige, 67; Verplanck v. Merct. Ins. Co. 1 Edw. 46.

(1) Amendments to a bill are always considered as forming a part of the original bill. They refer to the time of filing the bill; and the defendant original bill. They refer to the time of filing the bill; and the dericant cannot be required to answer any thing which has arisen since that time. Hurd v. Everett, 1 Paige, 124; Walsh v. Smyth, 3 Bland. 9, 20; O'Grady v. Barry, 1 Irish Eq. 56; Story Eq. Pl. § 332, 885 Unless, indeed, the defendant has not put in his answer, in which case the bill may be amended by adding supplemental matter. Story Eq. Pl. § 885; Candler v. Pettit, 1 Paige, 168; Ogden v. Gibbons, Halst. N. Jer. Dig. 172.

Consequently an original bill cannot be amended by incorporating therein any thing which arose subsequently to the commencing of the suit. This should be stated in a supplemental bill. Stafford v. Howlett, 1 Paige, 200; Saunders v. Frost, 5 Pick. 276.

Generally, a mistake in the bill in the statement of a fact should be corrected by an amendment, and not by a right statement of the fact in a supplemental bill. Strickland v. Strickland, 12 Simons, 253; Story Eq. Pl. § 332, 614; Stafford v. Howlett, 1 Paige, 200.

When the cause has proceeded so far, that an amendment cannot be made,

or if material facts have occurred subsequently to the commencing of the suit, the Court will give the plaintiff leave to file a supplemental bill. And where such leave is given, the Court will permit other matters to be intro-

And must be taken *pro con*fesso together. Addresed to same judge.

In what Cases much so, that where an original bill is fully answered and amendmay be made, ments are afterwards made, to which the defendant does not answer, the whole record may be taken, pro confesso, generally (1) (1); and an order to take the bill pro confesso as to the amendments only will be irregular (m). An amended bill must therefore, in all cases, be addressed to the same Lord Chancellor, Lord Keeper, or Lords Commissioners to whom the original bill was addressed, although a change has taken place in the custody of the Great Seal, between the times of filing the original bill and the amendment (n).

Defendant after answer to original bill to ed only. **Plaintiff** amending, loses his prior-

bill.

Although, however, the original and amended bill constitute but one record, and are so considered at the hearing, the defendanswer amend. ant, in case he has answered the original bill, ought to answer the amendments only (o) (2). Where there is a bill, or cross bill, and the plaintiff in the original suit amends his bill before answer, he will lose his priority of suit, and his right to have an answer before he ity over cross- is called upon to answer the cross bill. And it seems that, if such amendment be made after an order has been obtained for time to answer the cross bill till the answer to the original bill shall have come in, such order will in that case be discharged upon motion, without costs (p); and where a plaintiff, after amending his bill, obtains an order for time to answer a cross bill till the answer to his original bill shall have come in, the order for time will be discharged for irregularity, with costs (q).

Amending by alteration of parties (3).

Amendments to a bill are of two sorts, those which relate to parties and those which affect the substance of the case: under a common order to amend by adding parties, the plaintiff cannot alter his bill either by putting in the names of other persons as

- (l) Jopling v. Stuart, 4 Ves. 619.
- m) Bacon v. Griffith, ib. n.
- (n) Hind. 22.

- (o) Ibid.
- (p) Johnson v. Freer, 2 Cox, 371.

duced into the supplemental bill, which might have been incorporated in the original bill by way of amendment. Stafford v. Howlett, 1 Paige, 200. See Verplanck v. Merct. Ins. Co. 1 Edw. 46.

⁽¹⁾ Trust and Fire Ins. Co. v. Jenkins, 8 Paige, 589, cited next, in note.

⁽²⁾ See Thomas v. Visitors Fred. Co. School, 7 Gill & John. 369.

Where the plaintiff amends his bill after answer, if a further answer of the amended bill is not waived, the defendant must put in a further answer. to the amendment; or the plaintiff will be entitled to an order taking the whole bill, as amended, as confessed. Trust and Fire Ins. Co. v. Jenkins, 8 Paige, 589.

⁽³⁾ In reference to amending bills by adding parties, see ante, 285, in notes; Marshall v. Lovelass, Cam. & Nor. 239, 264; Benzein v. Lovelass, ib. 520.

Where a lunatic is a necessary party, on demurrer for his omission, leave will be granted to amend. Berry v. Rogers, 2 B. Monroe, 308.

co-plaintiffs with himself (r), or by striking out the names as Of amending plaintiffs of any persons filling that character upon the original record (s).

In some cases, special orders was however be obtained for these purposes; but as a diminution of the number of plaintiffs has the effect of lessening the defendant's security for costs, an order will not be made to strike out the names of plaintiffs without the Court also providing, at the same time, that security for the costs of the suit shall be given (1). In the case of Brown v. Lawer (t), one of two co-plaintiffs who had authorized the institution of the suit refused to proceed in it. A motion was accordingly made on behalf of the other co-plaintiff, that she might be at liberty to amend the bill by striking out the name of the co-plaintiff who had refused to proceed, and by making him a defendant, and that he might be ordered to pay the costs occasioned by such amendment, and also the costs of giving any security for costs which the defendants or any or either of them might be declared entitled to in consequence of such amendment and incidental thereto, and also the costs of and incident to that application, to be taxed as between solicitor and client, Lord Langdale, M. R., in giving judgment upon the motion, said, "The suit cannot be prosecuted unless the alteration is made, and therefore justice will not be done unless the alteration is made; I think therefore that this order must be made, but on such terms as will be just towards the defendants, and by securing the costs of suit already incurred; and the co-plaintiff having, by revoking the authority, made this application necessary, ought therefore to pay the costs (2)."

It must not be considered as a matter of course to obtain an Not of course order to strike out the name of a person who has once been made to strike out a plaintiff in a cause, even upon terms of giving security for costs. plaintiff. In the case of the Attorney-general v. Cooper (t), an application was made by a number of relators named in an information to strike out the names of several of themselves; Lord Cottenham, in refusing the motion, observed, "It cannot be justly said, that

⁽r) Milligan v. Mitchell, 1 M. & Sloggett v. Collins, 13 Sim. 456. C. 433.

⁽t) 3 Beav. 598. (t) 3 M. & C. 258. (s) Fellows v. Deere, 3 Beav. 353;

⁽¹⁾ Sweeny v. Hall, Sausse & S. 662.
(2) It is within the discretion of the Court to permit a bill to be amended, by substituting the name of a new for the original plaintiff, even after answer filed; but it must be upon the payment of all the costs, up to the time of the amendment, as well as of the amendment itself. Jennings v. Springs, 1 Bailey Eq. 181.

the Bill.

Of amending all that the relators have to establish in support of such an application is, that the defendants will not be prejudiced by such an alteration; they must show that justice will not be done, or that the suit cannot be so conveniently prosecuted unless the alteration is made. I cannot give them such an advantage as they ask, and permit them to alter the record merely because they may have a different wish at one time, from that which they may have at another time, which may be the result of mere caprice."

> In the case of Hall v. Lack (u), where it appeared that the association of a cestui que trust and trustee, as co-plaintiffs on the record, might materially injure the interests of the former, Sir J. L. Knight Bruce, V. C., gave leave to amend the record by striking out the name of the trustee as plaintiff, and making him a defendant.

> So also leave may be obtained to amend a bill, by the addition of persons as co-plaintiffs; but after answer, the addition of a coplaintiff is not a matter of course, but is discretionary in the Court.

> From the case of the Governors of Lueton Free School v. Smith (x), it would appear that where a plaintiff applies after an answer for leave to amend his bill, by adding a co-plaintiff, he must in support of his application show that the person proposed to be added, is willing to become a co-plaintiff.

No plaintiffs can be added to a bill of discovery.

Order to amend at hear-

ing, will not

authorize introduction of

new plaintiffs.

It is to be observed, that a bill of discovery cannot be amended by adding parties as plaintiffs. This was held to be the law of the Court by Lord Eldon in Lord Cholmondeley v. Lord Clinton (y), where a bill had been filed by cestui que trusts, in aid of an ejectment at Law, and the defendant pleaded facts to show that the legal estate was in the trustees. The difficulty in the case was, however, got over by the plaintiffs consenting to the allowance of the plea, and moving to amend by inserting a statement to show that the legal estate was in trustees, and that a count had been introduced in the declaration in ejectment on the demise of the trustees.

In a case before Lord Cottenham, his Lordship held that an order made at the hearing for leave to amend, by adding parties, did not authorize the introduction of new co-plaintiffs (z).

It is to be observed, that the Court will sometimes allow a bill, which has originally been filed by one individual of a numerous class, in his own right, to stand over at the hearing, in order to

⁽u) 2 Y. & C. 631; see also Plunkett v. Joice, 2 Scho. & Lef. 169; ante 119; Motteux v. Mackreth, 1 Ves. J. 142.

⁽z) M'Ld. 17. (y) 2 Mer. 71, 74.

⁽z) Milligan v. Mitchell, 1 M. & C. 511.

be amended by the introduction of the words "on behalf of him- Of Amending Thus, in Lloyd v. Loaring (a), where a demurrer was allowed, because the parties affected to sue in a corporate capacity, leave was given to amend, by making them sue in their individual rights as members of a co-partnership, on behalf of themselves and others (1).

the Bill.

It is said that the Court will, even after publication, and at any Parties added time before hearing, suffer parties to be added by amendment after publicaupon a proper cause being shown, and that even after a decree tion. and before it has been enrolled, persons interested may by peti- After decree tion be made parties and let into it, if their right be interwoven with the other plaintiffs and settled (in general) by the decree, they paying the plaintiffs a proportionable part of the charges of the suit (b).

It may, however, be observed, that after publication has passed, and the cause has been set down for hearing, the bill can be amended in no other respect than by making parties (c) (2), and that an order for leave to amend by adding a plaintiff will not be granted after replication where the plaintiff has been guilty of laches (d).

If parties are added after witnesses have been examined, the depositions of those witnesses cannot be read against them, as they have had no opportunity of cross-examining such witnesses (e), and if the parties are added after publication passed, the cause as to those parties must be heard upon bill and answer (3). If therefore a plaintiff after publication passed is advised that it will be necessary to bring other parties before the Court, and for that purpose to put new matter in issue, he must not proceed by amendment, but by supplemental bill (f).

With respect to those amendments which are made for the purpose of altering the case upon record, as against the defendants ring since bill already before the Court, it is not within the province of this work filed, cannot be introduced to point out the cases in which such amendments may become by amendment requisite, or to what extent they may be made. It is to be observ-

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(a) 6 Ves. 773; see also Attorney-
                                       (d) Milward v. Oldfield, 4 Price,
general v. Newcombe, 14 Ves. 1;
                                       (e) Pratt v. Barker, 1 Sim. 1.
and Good v. Blewitt, ubi supra, p.
239.
                                         f) Goodwin v. Goodwin, 3 Atk.
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(b) Prac. Reg. 301. (c) Goodwin v. Goodwin, 3 Atk. **37**Ò.

(1) See Pratt v. Bacon, 10 Pick. 123, cited post, 466, in note.

See post, 477, 478, notes and cases cited.
 See Smith v. Burnham, 4 Har. & John. 331; Stewart v. Duvall, 7 Gill & John. 180.

Amendments may be made.

In what cases ed, however, that a plaintiff ought not to introduce facts by amendments, which have occurred since the filing of the original bill. because as the amendments are held to constitute a part of the same record as the original bill, which can only relate to facts which have occurred at the time when it was preferred, the introduction of matters of a posterior date would render the record Matter, therefore, which has occurred since the original bill was filed, should be brought before the Court by supplemental bill, and not by amendment (g) (1).

Objections may be taken by answer as by plea or demurrer.

Upon this principle, where a plaintiff had, by amendment, introduced a fact which had occurred subsequently to the filing of the original bill, and the defendant, by his answer to the amended bill, stated this by way of objection to the new matter, and insisted upon the same advantage as if he had demurred or pleaded thereto; Sir J. Leach, M. R., refused to permit the plaintiff to read evidence at the hearing in support of the allegations introduced by the amendment; and, upon the plaintiff's counsel admitting that without such evidence they could not sustain their case, he dismissed the bill with costs; and his Honor's decision was confirmed by Lord Brougham, upon appeal (h).

In what case subsequent fact introduced. Where plaintiff has an incohate right on filing original ·bill :

Cases, however, do sometimes occur where the introduction, by amendment, of matters which have occurred since the date of the original bill will be permitted by the Court (2); thus, where the plaintiff has an inchoate right at the time of preparing his original bill, and which merely requires some formal act to render his title perfect; and such formal act is not completed till afterwards, (as in the instance of an executor filing a bill before probate, and afterwards obtaining probate,) the introduction of that fact by amendment will be permitted; and, upon the same principle, where a plaintiff filed her bill as a daughter and next of kin of an intes-

(g) Archbp. of York v. Stapleton, 2 Atk. 136. As the Court will not permit matter which is proper for a supplemental bill, to be introduced by amendment to an original bill; so it will not permit matter, which ought to be the subject of amendment, to be brought before the Court by supplemental bill. Colclough v.

Evans, 4 Sim. 76; vide etiam, Ryan v. Stewart, 1 Cox, 397; Milner v. Ld. Harewood, 17 Ves. 144, 148; Dean and Chapter of Christchurch v. Simonds, 2 Mer. 469; Knight v. Mat-thews, 1 Mad. 567; Macneil v. Cahel, 2 Bligh, 228. (h) Wray v. Hutchinson, 2 M. & K. 235.

tained her full age, and that she might be compelled to answer as an adult. Kipp v. Hanna, 2 Bland. 26.

⁽¹⁾ Hurd v. Everett, 1 Paige, 124; Walsh v. Smythe, 3 Bland. 9, 20; O'Grady v. Barry, 1 Irish Eq. 50; Story Eq. Pl. § 885, 332; Candler v. Pettit, 1 Paige, 168; Ogden v. Gibbons, Halst. N. Jer. Dig. 172, cited ante, 454, note; Stafford v. Hewlett, 1 Paige, 200.

(2) A bill was amended so as to charge that an infant defendant had attituded by the civil as amended to the control of the civil as amended to the civil as a standard the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standard to the civil as a standar

tate without taking out administration, upon which a demurrer In what cases was put in and allowed, and afterwards, to remedy the defect, the may be made. plaintiff took out administration to her father, and, having obtained an order, amended her bill by stating the letters of administration; whereupon the defendant pleaded in bar, the fact that the taking out the letters of administration was subsequent to the date of the bill, Lord Talbot overruled the plea, observing that the mere right to have an account was in the plaintiff, as she was next of kin of her father, and it was sufficient that she had now taken out letters of administration, which when taken out related to the time of the death of the intestate (i) (1).

It is to be observed, however, that where, after a bill has been not where put upon the file, any substantive facts occur which are material plaintiff's right to the Court's taking cognizance of the case, or to giving the plain- act; tiff title to relief at all, such matters cannot be introduced by as in case of amendment; therefore where a bill was filed for an account of an the enrolment annuity granted by a tenant for life, which amongst other securi- of a memorial ties, was further secured by a warrant of attorney to confess judgment, and the bill stated that the plaintiffs had caused a memorial of their securities to be enrolled according to the Act of Parliament then in force (k); but it appeared at the hearing, that, though a memorial of the annuity deed and of the bond had been enrolled. the warrant of attorney was not included in the memorial, Lord Thurlow, although he at first doubted whether he should not permit the parties to make a new enrolment of the securities, and, by amending the bill, bring the matter upon the record, ultimately said, that if the cause stood over for the purpose of enrolling the memorial, he did not see how it could be brought upon the record but by a supplemental bill (1).

(i) Humphreys v. Humphreys, 3 P. Wms. 348.

(k) 17 Geo. III. c. 26, repealed by 33 Geo. III. c. 141, and other provisions substituted in lieu thereof.

(l) Davidson v. Foly, 3 Bro. C. C. 598. It is to be noticed, that in the above case Lord Thurlow ultimately dismissed the bill; from which it may be inferred that his lordship's opinion was, that as the plaintiff's title was defective at the time when the original bill was filed, the defect could not be remedied by a supplemental bill; and this appears to have been the opinion of Lord Brougham in Prichard v. Draper, 1 R. & M. 191, in which a bill was instituted by a solicitor for payment of costs due to him from a client, and it appeared upon the answer, that he had not delivered a signed bill conformably to the Act; whereupon the plaintiff delivered a bill duly signed, and put the fact in issue by a supplemental bill. Lord Brougham, upon the case coming before him, expressed himself of opinion that the defect in the title of the plaintiff, as it stood at the institution of the suit, was not cured, although, as the objection was not urged at the original hearing, he thought it could not be taken on further directions. Vide post, Supplemental Suits.

⁽¹⁾ Where it appeared on demurrer to a bill by an executor, that the will

Amendments may be made. Where facts

In what cases

stated in defendant's answer, necessary to be explained.

It sometimes happens that a defendant, in his answer to an original bill, states facts which have occurred since the bill was filed. and the Court have in such cases permitted such facts to be incorporated into the bill by amendment. This point was much discussed in Knight v. Matthews (m), where the original bill stated, that an action had been commenced against the plaintiff, and the defendant by his answer referred to the trial of the action which had taken place between the time of filing the bill and the putting in of the answer; whereupon the plaintiff amended his bill, and stated the trial and its result. To this bill, so amended, a demurrer and a plea were put in, and Sir T. Plumer, V. C., overruled them both, and in so doing observed, "that in the interval between the filing of the bill and the answer, many circumstances may have occurred; and the defendant, when he puts in his answer must state the facts as they then are, and that if circumstances are introduced in the answer which have occurred subsequent to the filing of the bill, the plaintiff must be allowed to make amendments, so as to show that such new circumstances are not of the color he represents them, and to obtain a complete answer as to such circumstances."

Not necessary to amend to answer;

put in issue to the plaintin s case, but which is not necessary that the plaintiff, in order to avail himself of them at the hearing, should introduce such facts into his bill by amendment, (although perhaps the most convenient course would be to do so,) as the replication to the answer puts all the facts stated in it completely in issue between the parties, and the plaintiff may, after such replication, examine witnesses as to such facts as well as the defendant (n). Where, however, it is important to the plaintiff that a fact disclosed in the answer should be further inquired into, or avoided by some further statement, the practice is often resorted to of introducing such a fact from the answer of the defendant into the bill; and where a plaintiff, not being satisfied with the answer, amended his bill, stating, by way of pretence, a quotation from the answer, and negativing it, insisted that the facts

Where an answer of a defendant states facts which are material

to the plaintiff's case, but which have not been stated in the bill,

unless necessary to avoid their effect.

Or they are inquired into.

(m) 1 Mad. 566.

(n) Attwood v. ---, 1 Russ. 355.

would appear differently if the defendant would look into his ac-

was not proved, nor had the executor qualified, the plaintiff was allowed to amend. Billout v. Morse, 2 Hayw. 175. So a decree was suspended and leave given to a plaintiff to take out administration and state it by way of amend. Bradford v. Felder, 2 M'Cord, Ch. 170. See Butler v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butlet v. Butl ler, 4 Litt. 201.

counts - Sir T. Plumer held, that the matter so introduced was In what cases not impertinent (o) (1).

Great latitude is allowed to a plaintiff in making amendment, and the Court has even gone to the extent of permitting a bill to allowed in be converted into an information (p); it has also been held, where amendments; a plaintiff filed a bill, stating an agreement, and the defendant by by converting his answer admitted that there was an agreement, but different information; from that stated by the plaintiff, that the plaintiff might amend his by altering bill, abandoning his first agreement, and paying for a decree ac- statement so as to agree cording to that admitted by the defendant (q). In that case, how- with defenever, the amendment was permitted, because the bill in its original dant's answer. form might have been prepared under a mistake or misconception of counsel, and the plaintiff, having afterwards discovered the error, was allowed by the Court to abandon his original case, and insist upon the one alleged by the defendant; but the Court will not carry its liberality further, and permit a plaintiff to amend his bill, so that he may continue to insist upon the agreement originally stated, and if he fails in that, to get the benefit of the one admitted by the defendant. Upon this principle - where the original bill prayed the specific performance of an agreement, and the defendant denied the agreement as stated in the bill, but admitted a different one, whereupon the plaintiff amended his bill, continuing to insist on the original agreement, and praying in the alternative, if not entitled to that, to have the execution of the admitted agreement, - Lord Redesdale dismissed the bill with costs, but without prejudice to any bill the plaintiff might be advised to file to obtain a performance of the admitted agreement (r).

The question, whether the Court will or will not permit a bill, Whether a bill filed for the mere purpose of discovery, to be converted into one of discovery for relief, by the addition of a prayer for relief, does not seem to can be conv be settled. It appears, from a note by Lord Redesdale in his Trea- for relief. time on Pleading (s), that it was, formerly, a frequent practice for the plaintiff, in cases in which it was doubtful, whether he was entitled to relief in Equity or at Law, to frame his bill, in the first instance, for a discovery only, (so as to avoid a demurrer for want of equity, which, if allowed, would also have precluded his title to

(o) Seely v. Boehm, 2 Mad. 176.

Amendments may be made.

ted into a bill

⁽r) Lindsay v. Leach, 2 Sch. & Lef. 1; vide etiam, Woollam v. Hearn, 7 Ves. 222, and Deniston v. (p) President of St. Mary Mag-dalen v. Sibthorp, 1 Russ. 154. (g) Per Lord Redesdale, Lindsay v. Lynch, 2 Sch. & Lef. 9. (7) Lindsay v. Leach, 2 Hearn, 7 Ves. 222, and Dei Little, Sch. & Lef. 11, n.a. (s) Ld. R. 184, n. (z).

⁽¹⁾ See Harris v. Knickerbocker, 5 Wendell, 638; S. C. 1 Paige, 209.

Amendments

In what cases the discovery,) and having obtained the discovery to try, by amendmay be made, ing his bill, the question whether he was entitled to the relief. This practice, however, appears to have been long discontinued: and in Butterworth v. Bailey (t), in which a motion was made before Lord Eldon for leave to amend a bill of discovery, by adding a prayer for relief, his Lordship said, that he had no recollection of any such amendment having been permitted, and directed the case to stand over, in order that precedents might be searched for: no such precedents however were found, and his Lordship refused the motion with costs. It is remarkable that, notwithstanding the circumstances mentioned in the last case, as to precedents having been searched for, and not found, two cases are to be found in the books in which the practice of amending bills of discovery, by converting them into relief, has been resorted to. The first, Hildyard v. Cressy (u), and the other Crow v. Tyrell (z). With respect to the first, however, no question turned upon the propriety of the amendment, and the defendant had, in fact, answered the bill, after it was amended, so that it was not open to him to object to the amendment upon that ground; and with respect to the other case, it seems that although the form of the bill was effectually one for discovery merely, the intention of the plaintiff was to procure relief, and that he had made a case for it. It is to be observed also, that the order in that case was made more in the way of a compromise than as a decision, both parties having made mistakes, (the plaintiff in his bill and the defendant in his plea,) cross motions had therefore been made to rectify their mutual errors.

Semble, bill of discovery may be converted into a bill for relief.

It should be mentioned that the decision of Lord Eldon, in Butterworth v. Bailey, was acted upon by the Court of Exchequer in Jackson v. Strong (y), but that in a subsequent case before Lord Lyndhurst, Lousada v. Templer (z), his Lordship made an order that the plaintiff should be at liberty to amend his bill within fourteen days, by adding a prayer for relief and proper parties, or otherwise as he should be advised, &c. It is to be observed, however, that the order was not made upon a motion for that specific purpose, but upon a motion for a commission to examine witnesses in aid of an action at Law, on which occasion the Lord Chancellor, after expressing considerable doubts whether the facts mentioned in the bill would constitute a defence to the action at Law, said, he was inclined to think that whatever benefit the plaintiffs were entitled to derive, from the transactions referred to, in their resist-

⁽t) 15 Ves. 358.

⁽u) 3 Atk. 303.(x) 2 Mad. 397.

⁽y) 1 M'Lel. 245.(z) 2 Russ. 565.

ance to the demand made at Law, they might have it more effec. In what cases tually and safely by a bill for relief than by a bill for discovery and may be made. commission only; and for that reason made the order. It is also to be noticed, that no objection appears to have been made on the part of the defendants to the course of proceeding thus pointed out by his Lordship, nor were the decisions either of Lord Eldon or of the Court of Exchequer, above noticed, then alluded to-

On a subsequent occasion, however, in the same case, the dicta But in such of Lord Eldon in Butterworth v. Bailey, were brought forward in case defendant support of a motion made by the defendant to have the answer to may answer the original bill taken off the file, upon which motion an order was made that the defendant should be at liberty to put in an answer to the original and amended bill, as if no answer had been filed to the bill of discovery; and that the plaintiff should be at liberty to take exceptions to the answer to the original and amended bill, as he should be advised. The plaintiff was also ordered to pay the costs of the suit up to that time, including the costs of the application (a).

Upon the whole, therefore, the result of this course of proceeding appears to have placed the plaintiff in a situation very little (if at at all) better than he would have been had he dismissed his original bill for a discovery, and filed a new one for relief; so that it may fairly be questioned whether the decision of Lord Eldon, in Butterworth v. Bailey, and of the Court of Exchequer, in Jackson v. Strong, are at all weakened by the course adopted by Lord Lyndhurst in the case last quoted. At all events, it is es- Defendants tablished that whatever the course adopted by the Court may be, entitled to with respect to allowing bills of discovery to be converted into costs of disbills for relief, such course will not prejudice the right of the defendants to their costs of the discovery, and to put in a new answer, adapted to the new form given to the proceeding.

In a case where a defendant filed a cross bill for the purpose of getting a discovery only from the plaintiff in the original suit, but dad not put in any answer to it before the hearing of the original cause, in consequence of which the discovery became useless, whereupon the plaintiff in the cross bill amended it by converting it into a bill for relief; the V. C. of England, upon a motion being made to expunge the amendment, with costs, thought that, under the special circumstances, the plaintiff in the cross bill might be allowed to convert the prayer for discovery into one for relief, because a cross bill is to be treated with greater indulgence than an

Bill for relief cannot be amended by striking out prayer.

In what Cases original bill; he therefore refused the motion to expunge, but ormay be made, dered that part of it, which related to costs, to stand over till the hearing of the cause (b).

> It has been determined by Lord Eldon, that, as a bill for discovery cannot be amended by converting it into a bill for relief, so neither can a bill for relief be converted into a bill for discovery by striking out the prayer. Thus, in Earl Cholmondeley v. Clinton (c), where the defendants, having answered the bill, obtained an order for the plaintiff to elect whether he would proceed at Law or in Equity; whereupon the plaintiff elected to proceed at Law, and moved to dismiss his bill as far as it sought relief, and to amend the record by striking out the prayer for relief, the motion was refused, the Lord Chancellor being of opinion that the better course for the plaintiff would be to dismiss his bill and file another for discovery only, which was done (d).

Costs where plaintiff makes an entire

It is to be observed here, that if a plaintiff takes advantage of an order to amend, so as entirely to change his case and to make case by amend. the bill a perfectly new one (1) he will be ordered, upon motion. to place the defendant in the same position, with regard to costs, that he would have been in had the plaintiff, instead of amending. dismissed his original bill with costs and filed a new one (2). Thus, where a plaintiff originally filed his bill against the defendant as his bailiff or agent, in respect of certain farms, praying an account against him upon that footing, and afterwards, upon an issue being directed to try whether he was or was not a mortgagee of such farms, and the jury finding that he was, the plaintiff amended his bill by stating the mortgage, and converting his former prayer for relief into a prayer for a foreclosure; upon the defendant's making a motion, one of the objects of which was, that the amended bill might be taken off the file, and that it might be referred to the Master to tax the defendant's costs, and

> see however the case of Parker v. Ford, 1 Col. 506. (c) 2 V. & B. 113. (d) 2 Mer. 71. In the above case,

Gurish v. Donovan, 2 Atk. 166, was cited in argument in support of the

(b) Severn v. Fletcher, 5 Sim. 457; motion, but upon reference to the registrar's book, it appeared that the order for striking out the prayer was made by consent, and that an answer was put in by the defendant after the order was made, 2 V. & B. 114, n. a.

⁽¹⁾ A party under the privilege of amending, shall not introduce matter, which would constitute a new bill. Verplanck v. Merct. Ins. Co. 1 Edw. 46.

After a decision upon a plea to the jurisdiction, that a bill in Equity between members of a manufacturing corporation cannot be sustained, the Court will not grant the plaintiff leave to amend, by averring that the corporation had been dissolved; this being in effect to make a new and distinct case. Pratt v. Bacon, 10 Pick. 123. (1) See Lloyd v. Brewster, 4 Paige, 538.

that the amended bill might be taken off the file, Lord Eldon Costs where held, that the defendant was entitled to all the costs sustained by new case made by hv Amend. him beyond what he would have been put to if the bill had been originally a bill for a foreclosure, and made an order accordingly, although he did not go the length of ordering the amended bill to be taken off the file (e).

Upon the same principle, where a plaintiff takes advantage of Where plainan order to amend or strike out a portion of his bill, though he tiff amends does not alter the nature of it, yet, if expenses have been occa- his bill by sioned to the defendant by the part which has been struck out, important which, in consequence of its having been so struck out, could parts. not be awarded to him at the hearing, the Court will, upon motion, order such costs to be taxed and paid to the defendant. Thus, where a plaintiff filed a bill which was of great length and prayed relief in a variety of matters, to which the defendants put in answers, which were also of great length, after which the plaintiff, by virtue of a common order to amend, amended his bill and filed a new engrossment, which was very short, and confined to one only of the objects of relief prayed by the original bill; upon the defendants moving that the order to amend might be discharged, and the bill dismissed with costs, or that the plaintiff might pay to them the costs of putting in their answer to so much of the original bill as did not relate to the relief prayed by the amended bill, the Lord Keeper Henley directed that the order for amending the bill should stand, but ordered that the plaintiff should pay to the defendants the further sum of five pounds bevond the sum of twenty shillings mentioned in the order (f). And where a cause, at the hearing, was ordered to stand over. with liberty to the plaintiff to amend by adding parties, and the plaintiff took advantage of that order to strike out several charges which had necessarily led the defendant into the examination of witnesses, and to add others, the Court, upon motion, ordered that part of the amendment to be discharged and the plaintiff's bill to be restored to what it was before, in order that, at the hearing, the costs of those parts of the bill which had been abandoned by the plaintiff might be awarded to the defendant (g). When, however, a bill was filed for a foreclosure of a mortgage and for a transfer of a sum of stock, and on the answer being filed, disclosures were made which rendered it advisable to amend the bill by striking out all that related to the mortgage, whereby nearly one-

⁽e) Smith v. Smith, Cooper, 141; (g) Bullock v. Perkins, 1 Dick. and see Mayor v. Dry, 2 S. & S. 113. 110; and see Strickland v. Strick-(f) Dent. v. Wardell, 1 Dick. 339. land, 3 Beav. 242.

a new case by

Costs where half of the bill and answer was rendered useless, the V. C. of Plaintiff makes England refused to order on motion the plaintiff to pay the defen-Amendment, dant's costs occasioned by the amendment, as it appeared that the amendment was made under the advice of counsel, and not for the purpose of vexation or oppression (h).

After amendment, defendant entitled to make a new defence ;

but not to demur to what had been be-

Any amendment of a bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer, making entirely a new defence and contradicting his former answer (1). Thus, in Bolton v. Bolton (i), the V. C. of England on this ground refused, with costs, a motion to take an answer to an amended bill off the file, (although it was filed nearly three years after the bill had been amended, and eight years after the original answer,) and contradicting the original answer, introduced no less than four new issues or defences. An amendment of the bill does not however necessarily enable a defendant fore answered, to demur to a bill which he had previously answered; for in the case of Ellice v. Goodson (k), Lord Cottenham, overruled a demurrer to an amended bill, which had been filed by a defendant who had fully answered the original bill, upon the ground that, as the amendment had not materially varied the case originally made against the demurring party, and as passages existed in the amended bill which had previously been answered as part of the original bill, the answer overruled the demurrer.

No amendment made, except upon order.

No alteration can be made in any pleading or other matter, after it has been filed, and by that means become a record of the Court, without the sanction of a previous order (2). Orders for leave to amend bills are usually granted on the application of the plaintiff, and may be had, subject to the rules and regulations hereafter pointed out, at any period of the cause previously to the hearing (3).

By the 64th Order, of May, 1845, leave to amend a bill may

(h) Monck v. The Earl of Tankerville, 19 Sim. 284.

lations, Beames.

(k) 3 M. & C. 653; see Order 37th August, 1841, which has been (i) 29th June, 1831. MSS. or re- issued subsequently to this case.

⁽¹⁾ Trust and Fire Ins. Co. v. Jenkins, 8 Paige, 589.
See Bosanquet v. Marsham, 4 Simons, 573; Richardson v. Richardson, 5 Paige, 58; Thomas v. Visiters Fred. Co. School, 7 Gill & John. 269. In this last case an additional answer to an amended bill was ordered to be taken off the file, because not filed with leave.

⁽²⁾ See Thomas v. Visters of Fred. Co. School, 7 Gill & John. 369.
(3) See Luce v. Graham, 4 John. Ch. 170; Hunt v. Holland, 3 Paige, 78; Rule 28th of the Equity Rules of the Supreme Court of the United States; Rule 10th of the Regulation of Practice in Changery, Mass.

be obtained at any time before answer, upon motion or petition, without notice. This Order does not seem to have made any difference in the practice, as it has prevailed since the revised edition of the Orders of 1828, issued in 1831. The result is, that the plaintiff may have as many orders of course to amend his bill before answer as he requires. After he has obtained any such order to amend, he has in all cases in which the order is not made without prejudice to an injunction, fourteen days after the date of the order within which he may amend his bill. If he does not amend within fourteen days, the order becomes void (1), and the cause as to dismissal stands in the same situation as if such order had not been made (m) (1).

It must not be supposed that the fact of the plaintiff not making his amendment within this period, precludes him from obtaining another similar order of course to amend upon the same terms at any time before an answer has been put in (n). If, however, In injunction the plaintiff has obtained an injunction in the cause, and the or- causes. der is to amend without prejudice to it, then the bill must be amended within seven days from the date of the order, otherwise the order becomes void, and the cause as to dismissal stands in the same situation as if such order had not been made (o). would seem that after one such order has become void, a second similar order to amend without prejudice to the injunction cannot be obtained in the same manner as successive orders to amend in other than injunction causes may be had before answer (p) (2).

If at the time when the order for amendment is made, none of Costs of the defendants have appeared, the plaintiff is entitled to amend Amendment. without payment of costs (3). So also, if any of the defendants having appeared have not answered, and if no new engrossment of the bill is necessary, the plaintiff may amend without payment of any costs to them, upon procuring the office copies of the bills of such of the defendants as have taken them to be amended. if any of the defendants having answered, are not required to answer

^{(1) 16}th Order, May, 1845, Art. 34.

⁽e) 16th May, 1845, Art. 35. (p) 60th Order, May, 1845.

⁽m) 70th Order, May, 1845.
(n) Nicholson v. Peile, 2 Beav. 497.

⁽¹⁾ The proper time to apply for leave to amend is before the cause is at issue. Story Eq. Pl. § 886, and notes.
(2) An injunction bill will not be amended unless the proposed amend-

ments are distinctly stated to the Court, and verified by the oath of the plaintiff; nor unless a sufficient excuse is rendered for not incorporating them in the original bill. Rogers v. Rogers, 1 Paige, 424. See West v. Coke, 1

Murphy, 191.

(3) Whese no answer or plea has been filed, the plaintiff may amend without costs. Saunders v. Frost, 5 Pick. 259; Droullard v. Baxter, 1 Scam. 191.

By Order made further, and no new engrossment of the bill is necessary, the plaintiff may amend in like manner without payment of any costs. cases the amendments in the office copies are made by the clerk of If, however, the plaintiff requires a further anrecords and writs. swer from any defendants who have answered, or if a new engrossment of the bill be necessary, then the plaintiff must pay twenty shilings costs (q) to each defendant or set of defendants who have taken office copies or answered. The practice of the Court requires, that if the amendment extend in any one place to a hundred and eighty words or two folios, a new engrossment is necessary; or, if the bill has been so often amended, that the amendments to be inserted, though under two folios, cannot be interlined upon the record, or are so considerable as to blot and deface it, a new engrossment must be made and annexed to the original record (q) (1).

> The draft of the amended bill is settled and signed by counsel (r), and in addition to the signature of counsel, an amended information must be sanctioned and signed by the Attorney-gen-The record of the bill, when amended, is marked with the date of the order, and of the day on which the amendment is made, and is thereupon filed (s).

> The plaintiff's solicitor must on the same day give notice to the defendant's solicitor or to all the solicitors for the defendants, if more than one, of the filing thereof (t).

And it may observed, that where the order is made upon pay-

- (q) Boddington v. Woodley, 9 Sim. 380; Breeze v. English, 2 Hare, 638. (q) 1 Turn. & V. 169; Hinde, 22.
- (r) Kirkley v. Burton, 5 Mad. 378. (s) Order, 12th of May, 1838.

- (t) Ibid.

The plaintiff may, however, set forth in the amended bill all the charges of the original bill. Fitzpatrick v. Power, 1 Hogan, 24. But see Walsh v. Smyth, 3 Bland, 9, 21; Luce v. Graham, 4 John. Ch. 170; Willis v. Evans, 2 Ball & Beat. 225. In Walsh v. Smyth, ubi supra, it was held, that the original bill should be recited in the amended bill no further than is necessary to introduce the amendments, so as to avoid impertinency. See also Luce v. Graham, ubi supra; Bennington Iron Co. v. Campbell, 2

Paige, 159.
When amendments are made to a bill, if the plaintiff file or serve an entire new bill, incorporating therein, as well the original matter as the amendments, he must distinctly designate the amendments in the new bill. Bennington Iron Co. v. Campbell, 2 Paige, 159. See also Hunt v. Holland, 3 Paige, 82; Luce v. Graham, 4 John. Ch. 170.

⁽¹⁾ In Pierce v. West, 3 Wash. C. C. 354, it is held, that the amendment should be by a separate bill, and not by interlining the original bill. So in Walsh v. Smyth, 3 Bland, 9, 21. This, however, is not the practice in all cases. See Luce v. Graham, 4 John. Ch. 170; Willis v. Evans, 2 Ball & Beat. 225; State Bank v. Reeder, Halst. N. J. Dig. 172. By these cases it appears that if there be not much new matter to be introduced, it is to be done by interpolation; but if much, it is to be done on another engrossment, to be annexed to the bill, in order to preserve the record from being defaced.

ment of costs, those costs should be paid or tendered before any Costs paid by further proceedings are had, otherwise the defendant may apply to the Court to stay such proceedings until the plaintiff has fulfilled the condition by making the required payment (u). The sum of 20s. being frequently very inadequate to remunerate the defendants for the expense incurred by the plaintiff amending his bill; by the 29th of the Orders of 1828, it is provided, "That where Costs paid by a plaintiff is directed to pay to the defendant the costs of the suit, plaintiff as a plaintiff is directed to pay to the defendant site costs of site cause then the costs occasioned to a defendant by any amendment of costs in cause where ordered the bill shall be deemed to be part of such defendant's costs in the to be paid by cause (except as to any amendment which may have been made him; by special leave of the Court, or which shall appear to have been unless bill amended by rendered necessary by the default of such defendant), but there special leave shall be deducted from such costs any sum or sums which may or through defendant a dehave been made by the plaintiff according to the course of the fault. Court at the time of any amendment."

And by the 30th of the same Orders it is directed, that when paid, deducted. upon taxation a plaintiff who has obtained a decree with costs is Defendant's not allowed the costs of any amendment of the bill, upon the costs deducted ground of its having been unnecessarily made, the defendant's from costs paid costs occasioned by such amendment shall be taxed, and the der a decree. amount thereof deducted from the costs to be paid by the defendant to the plaintiff.

Moreover, the Masters, upon special applications to them, may order and direct whether the costs of the application shall be costs in the cause, or whether such costs, or any part thereof, shall be paid by any of the parties personally; and in the latter case the said Masters respectively shall in all such orders either fix the sum so to be paid for such costs, or tax the same at their discretion (z).

We have seen before that where a plaintiff, after answer, changes his whole case by amendment, special appplications concerning the costs may be made by the defendant to the Court (a).

It now remains to consider the circumstances under which a Amending afbill may be amended after answer (1). By the 16th Order of ter answer, and before rep-May, 1845, "In cases where there is a sole defendant, or where lication.

(u) Breeze v. English, 2 Hare, 638. (a) Ante, p. 466. (z) 23rd Order, 1833.

Plaintiff.

Sums already

⁽¹⁾ See Droullard v. Baxter, 1 Scam. 191; Rules 29th and 30th of the Equity Rules of the Supreme Court of the United States, January Term, 1842; Rules 10th and 18th of the Regulations of Practice in Chancery in Massachusetts.

Costs of Amending

there being several defendants, they all join in the same answer. the plaintiff may, after answer and before replication or undertaking to reply, obtain one order of course for leave to amend the bill, at any time within four weeks after the answer is deemed or found to be sufficient." "In cases where there are several defendants who do not join in the same answer, the plaintiff (if not precluded from amending, or limited as to the time of amending by some former order), may after answer, and before replication or undertaking to reply, at any time within four weeks after the last answer is deemed or found to be sufficient, obtain one order of course, for leave to amend his bill (b)."

These regulations do not seem to have altered the previous practice further than that they substitute four weeks in the place of six weeks after the answer, or the last of several answers is sufficient as the period within which an order of course to amend may be obtained. In computing this period of four weeks the times of vacation are not to be reckoned (c). A plaintiff is further entitled to an order for leave to amend a bill only for the purpose of rectifying some clerical error in names, dates, or sums, which may be obtained at any time upon motion or petition without notice (d).

But except for the limited purpose just mentioned, when an answer has once been put in by any one defendant, and the bill has been subsequently amended, the plaintiff is not entitled as of course and without notice to another order to amend, and this rule applies notwithstanding some of the defendants may answer subsequently to the date of the amendment.

In the case of the Attorney-general v. Nethercoat (e), a defendant was added by amendment after answer, and Lord Cottenham decided, that upon the proper construction of the 13th Order of

(b) 66th Order, May, 1845; and 16th Order, Arts. 32 and 33.
(c) 14th Order, May, 1845, and p. 336. By the 8th Order of May, 1845, the Vacations to be observed in the the Vacations to be observed in the several offices of the Court, except in the office of the Accountant-general, are to be four in every year, viz. the Easter Vacation, the Whitsun Va-cation, the Long Vacation, and the Christmas Vacation; and

 The Easter Vacation is to commence and terminate on such days as the Lord Chancellor shall every year specially direct.

2. The Whitsun Vacation is to commence on the third day after Easter Term, and to terminate on the second day before Trinity Term in every

3. The Long Vacation is to com-mence on the 10th day of August, and terminate on the 28th day of October in every year.
4. The Christmas Vacation is to

commence on the 24th day of December in every year, and terminate on the 6th day of the following month of January; and

5. The days of the commencement and termination of each Vacation are to be included in and reckoned part of such Vacation.

(d) 65th Order of May, 1845.

(e) 2 M. & C. 604.

For the pur-pose of rectifying clerical errors.

1828, no further amendment of the bill could be made even as Amending afagainst the defendant so added, except upon a special application. Although the 13th Order of 1828, has been discharged, yet as the Replication. language of the order substituted in its place is similar to that upon which the decision was made (f), the rule established by the above case remains unaffected.

ter Answer, and before

For the purpose, however, of determining whether an order of After insufficourse to amend can be obtained; an answer reported by the cient answer. Master to be insufficient, or the insufficiency of which is admitted by the defendant, must be considered as no answer, and consequently a motion to amend after such insufficient answer, or after a demurrer or plea overruled, is of course, and does not preclude the plaintiff from obtaining a further order of course for the amendment of his bill after a sufficient answer has been put in (1). It must however be recollected that an answer is deemed sufficient until the report of its insufficiency is made and filed, and further that an amendment of the bill made previously to the filing of such report, operates as an admission of the sufficiency of the answer; consequently, however insufficient an answer may be in fact, an amendment of the bill before the report of such insufficiency is filed, will have the effect of preventing any further order to amend, as of course.

All the applications to amend hitherto considered are of course, To whom apand require no notice, and they are made either to the Lord Chan-plications to cellor, the Vice-Chancellor, or the Master of the Rolls; formerly special orders to amend, were in like manner granted by the Court itself; but now by 3 & 4 Will. IV. c. 94, s. 13, the Masters in ordinary of the Court are to hear and determine all applications for time to plead, answer or demur, and for leave to amend bills, and for enlarging publication, and all such other matters relating to the conduct of the suits in the Court as the Lord Chancellor. with the advice and assistance of the Master of the Rolls and Vice-Chancellor, or one of them, shall, by any general order or orders, direct, in such manner and under such rules and regulations as by any general order or orders to be also issued by the Lord Chancellor, with the advice and assistance aforesaid, shall be directed, with a power however of appeal from the order made

further order of course is to be granted after an answer has been filed." 13th Order, 1828. "No further

(f) 66th Order, May, 1845. "No leave to amend shall be granted after an answer and before replication, unless," &c.

⁽¹⁾ Chase v. Dunham, 1 Paige, 572, cited post, 485, in note. 40*

To whom Ap- on such application to the Lord Chancellor, Master of the Rolls, Amend made or Vice-Chancellor, whose order made upon such appeal is to be final and conclusive: and by the fourteenth section of the above Act, it is enacted that no such application as above mentioned shall in future be heard by any of the judges of the Court of Chancery, except on appeal as therein before provided. Soon after the passing of the above Act, a doubt was suggested to the Court as to whether it extended to all cases where leave was required to amend, or only to those in which a special application was required by the orders and practice of the Court; and in Cullingworth v. Grundy (g), Lord Brougham, after conferring with Sir J. Leach, M. R., and the V. C. of England, decided, that the above clause was confined to special applications, and did not take away the jurisdiction of the judges of the Court to make orders upon motions of course.

Operation of 3 & 4 Will. IV. c. 94.

As this Act is of consequence in the practice of the Court, it will be convenient to state fully its operation.

In the case of Strickland v. Strickland (A) Lord Langdale, M. R., explained the peculiar construction which had been put upon it, and observed, "That it had received a liberal construction, and had been construed with reference to the established rules and practice of the Court, and with a view to carry into effect, and not defeat the intention of the legislature. Though it says, that certain things are to be done by the Master, and by the Court upon appeal only, yet it has been held, that in some cases, convenience and the interests of the suitors require that the order should be made by the Court in the first instance. Thus, when the order is of course, and requires neither hearing nor argument, as in the case of an order of course to amend, the Court holds it unnecessary to make an application to the Master. So when the practice is regulated by the general Orders, and it becomes necessary in particular cases to relax or dispense with them, it is held that the Act does not apply, for the Master has no power to relax or dispense with the general Orders of the Court. Thus, where the general Orders directed that no order to amend shall be made, except within a stated time, the Master has no power to grant leave to amend, after that time has expired. It would be highly absurd to go to the Master for that which he has not authority to give, and then come to the Court, by way of appeal, from the Master's decision. Another instance is, where a party requires something which he may obtain on an application to the Master, but which is essen-

⁽g) 2 M. & K. 359; see orders of (h) 4 Beav. 146. 1833, 23, 24, and 25.

tially connected with something else which the Master has not Amending afpower to grant. In such a case, the application is properly made to the Court. It would be a grievous hardship, and an unneces- Replication. sary expense, to make a party separate the two things, and be required to make two applications, one to the Master, and the other to the Court. And again, where the cause is before the Court at the hearing, or on any occasion, and the whole facts having been necessarily brought before the attention of the Court, it is suggested, that an amendment, or something else, is necessary: in such a case, the Court will itself make the order; for nothing would be more uselesss, than to send the matter for adjudication to an inferior jurisdiction, when the appellate Court has already cognizance of all the facts necessary for a decision."

If after one order of course to amend, obtained subsequently to Second order an answer, the plaintiff is desirous of amending the second time, answer. he may, under this Act, make a special application to the Master for leave so to do; and for this purpose, he must take out a warrant, specifying at its foot the object of the application, and serve the same two clear days before the return (i) (1). If this special application is made within the period of four weeks from the time How obtained. when the answer, or last answer, is deemed sufficient, it may, under the 67th Order of May, 1845, be granted upon affidavit to the effect: -1. That the draft of the proposed amendments has been On what affisettled, approved, and signed by counsel; and 2. That such amend-davits. ment is not intended for the purpose of delay or vexation, but because the same is considered material for the case of the plaintiff. Without such affidavits, the application cannot be granted, and they must be made either by the plaintiff and his solicitor, or by the solicitor alone, in case the plaintiff, from being abroad or otherwise, is unable to join therein (k).

If the Master, upon the case made before him, refuse to grant an order to amend, the plaintiff may appeal from his decision to the Court, but during such period of four weeks after the answer or the last of the answers is to be deemed sufficient, the Court does not make orders for leave to amend otherwise than upon appeal (1).

In the case of Bertolazzi v. Johnston (m), the original bill was filed against the sole defendant, after whose answer the plaintiff amended and made other persons parties defendants. A question

i) 20th Order, December, 1833. (k) 69th Order, May, 1845.

⁽l) 3 & 4 Will. IV. c. 94, s. 14. (m) 2 Hare, 632.

⁽¹⁾ See Kirby v. Thompson, 6 John. Ch. 79.

ter Answer and before Replication Master continues.

Amending af- there arose whether the addition of parties to the bill had the effect of giving a new point of time from which the period of six weeks mentioned in the 13th Order of 1828, was to be computed. Sir J. Wigram, V. C., decided that it did not do so, and it which jurisdic- seems clear that this decision will apply to the 66th Order of tion of the May 1845 May, 1845, so that a plaintiff amending his bill after answer, by adding new defendants, will not acquire a right to obtain a special order to amend under the 66th Order within four weeks after the answers of the new defendants deemed sufficient, but the time during which the plaintiff may amend under that Order must be counted from the date when the last answer of the original defendants was sufficient.

To whom the application must be made.

Under the 13th Order of 1828, when the period of six weeks from the sufficiency of the last answer had expired, the jurisdiction of the Master to give leave to amend ceased, upon the principle that the language of the 13th Order was peremptory in forbidding further orders to amend, and that the Masters had no power to dispense with the general Orders of the Court (n). The language of the 13th Order of 1828, upon which this decision was made is, that " No order to amend shall be made after answer, and before replication, either without notice, or upon affidavit, in manner hereinaster mentioned, unless such order be obtained within six weeks after the answer;" this language is not to be found in the 66th of the Orders of 1845, and moreover, these last-mentioned Orders seem to contemplate leave to amend being obtained from the Master after the expiration of the four weeks from the sufficiency of the last answer; for by the 68th, it is directed, that "After the plaintiff has filed or undertaken to file a replication, or after the expiration of four weeks from the time when the answer or last answer is deemed sufficient, a special order for leave to amend a bill is not to be granted without further affidavit showing that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into such bill."

After the expiration of four weeks from sufficiency of answer.

As the 67th and 68th Orders together define the affidavits without which the plaintiff cannot obtain an order to amend after the expiration of four weeks from the time that the answer or last answer is deemed sufficient, it may be inferred, that hereafter orders to amend may at this period of the cause be granted by the Master upon such affidavits; and if that be the case, it must follow that

⁽n) Lloyd v. Wait, 4 M. & C. 244; Bertolazzi v. Johnston, 2 Hare, 257; Smith v. Webster, 3 M. & C. 634.

such orders will not then be granted by the Court otherwise than After Replicaupon appeal.

Before the Orders of 1845, when the period of six weeks from the sufficiency of the last answer had expired, and before replication, the Court itself, under its power of dispensing with the general Orders, sometimes received applications for leave to amend. It seems that such an application was not granted without an affidavit in addition to those mentioned in the last page, showing that the matter of the proposed amendment was material, and could not with reasonable diligence have been sooner introduced into such bill (o).

Before the Orders of 1845 were issued, the Masters had juris- Amendment diction to grant leave to amend after replication; but it was necessary for that purpose that they should have been satisfied by affidavit, "that the matter of the proposed amendment was material, and could not with reasonable diligence have been sooner introduced into this bill (q) (1)." In addition to this affidavit, which was all that was directly required by the general Orders, Lord Cottenham seems to have considered that it was incumbent upon a plaintiff, applying for leave to amend after replication, to depose to the facts required by the 67th and 68th Orders of 1845, and also to state the nature of the amendments he proposed to make The 67th and 68th (s) Orders of 1845, now determine the affidavits upon which the plaintiff may apply to the Master for an order to amend after replication; but it may be observed, that the further affidavit to be made for the purpose of obtaining an order to amend after replication, or after four weeks from the sufficiency of the last answer, must show that the proposed amendment is material; and, according to Sir J. Wigram, V. C., this cannot be established without the judge to whom the application is made being made acquainted with the nature of the amendment (t.)

Before the Orders of 1828, it was the practice to allow the plaintiff after replication, to amend his bill for the limited pur-

(o) 2 Hare, 637.

⁽q) 15th Order, 1828.

⁽r) 4 M. & C. 8.

⁽s) Pages 475 and 476. (t) Phillips v. Goding, 1 H. 43.

⁽¹⁾ Thorn v. Germand, 4 John. Ch. 363.

If the plaintiff files a replication to the answer after he is apprised of the necessity of an amendment to his bill, he precludes himself from making such amendment. Vermilyea v. Odell, 4 Paige, 121.

The application to amend should be made as soon as the necessity for an amendment is discovered. Rogers v. Rogers, 1 Paige, 424.

After Replication.

pose of adding parties without withdrawing his replication, and leave for amendments of this kind was obtained by motions of course (1).

For the purpose of adding parties.

In the case of Brattle v. Waterman (u), the V. C. of England decided, that this practice still continued, and said, that the Orders of 1828 did not apply to amendments by adding parties.

The 68th Order of May, 1845, like the 15th of 1828, does not in terms mention amendments by adding parties, but as by the 65th Order (v), leave to amend for rectifying clerical errors, &c. may be obtained at any time, and no mention is made of amendments for adding parties; it is presumed that now amendments for adding parties, are subject to the same restrictions as amendments for general purposes. In support of this view, it may also be observed, that the 15th Order of 1828 had reference in terms to cases where the replication was withdrawn, and consequently from its language an inference could be drawn, that it was not intended to apply to amendments for adding parties which do not require the replication to be withdrawn; whereas the 68th Order of 1845 appears to apply to all amendments, whether of such a nature as to require the replication to be withdrawn

Amendment after publication.

It is stated that the Court will, even after publication has passed, and the cause set down, suffer the bill to be amended by adding parties (x) (2). And there does not seem to be anything in the recent Orders to prevent the continuation of this practice, upon sufficient affidavits under the 68th Order; but it appears that if the parties are added after publication has passed, the cause as to such parties must be heard upon bill and answer only (y). A bill, however, cannot be amended after publication in any other respect than by making parties, and no new charge can be introduced, or material fact put in issue, which was not so before; but a supplemental bill should be preferred (z) (3). And where a

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(u) 4 Sim. 125.
                                            5; Quantock v. Bullen, 5 Mad. 81.
                                            (z) Goodwin v. Goodwin, 3 Atk. 371; Milligan v. Mitchell, 1 M. &
(v) Page 472.
(x) Hind. 25.
                                            C. 433.
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(y) Ibid; see James v. James, 4 Beav. 580; Pratt v. Barker, 1 Sim.

See Small v. Attwood, 2 Younge & Jer. 512.
 See Thorn v. Germand, 4 John. Ch. 363. But see Pleasants v. Logan, 4 Hen. & Munf. 489.

⁽³⁾ After the witnesses in a cause have been examined, and the proofs closed, no amendment of the bill is allowed, except in matters of mere form,

plaintiff, by a false suggestion that the cause was at issue only, had After Publicaobtained an order for liberty to amend his bill, by the addition of a prayer which had been accidentally omitted, the order was discharged upon a motion made by the defendant at the opening of the cause when it came on for hearing (a). It is said, in an Amendment anonymous case, in Atkyns (b), that, after publication has been ties after pubpassed, there is no instance of a plaintiff obtaining an order to lication withamend without withdrawing his replication (1). vation, however, appears to be a mere dictum, and it certainly cannot apply to cases where the amendment is merely by adding parties, in which case to require the replication to be withdrawn previously to the amendment would be absurd, as the only purpose answered by withdrawing it must be that of enabling the plaintiff to reply, de novo, to the answers of the new defendants, which would be useless, the rule being, as above stated, that, in such cases, the cause as to those defendants must be heard upon bill and answer only. In Habergham v. Vincent (c), Lord Thurlow intimated an opinion, that after a decree had been made, passed and entered, without bringing before the Court a personal representative who had become so after the bill was filed, he might be added by amendment, and that a motion for the purpose would be regular, provided it was only for the purpose of making him a witness to what was done in the Master's office; but that, if there was any thing in the decree affecting him in the way of an order to pay, such an order would be out of the power of the Court.

The obser- out withdraw-ing replication.

Where it is intended to amend a bill after replication filed, by In what cases the addition of new facts or charges, the proper course is to apply necessary to withdraw repfor leave to withdraw the replication and amend; and it seems lication before that an order of this description may be obtained at any time be-amendment. fore publication, upon application to the Master, supported by the affidavits required by the 67th and 68th Orders of 1845.

Sometimes the Court, at the hearing, will order a cause to stand over, with liberty to the plaintiff to perfect his case by amendment, upon his paying the costs of the day. Thus, as we have seen, that at the hearing, if the record appears to be defective for

⁽a) Harding v. Cox, 2 Atk. 583.(b) 1 Atk. 51.

⁽c) 1 Ves. J. 68.

and that under very special circumstances. Bowen v. Idley, 6 Paige, 467. See Wilbur v. Collier, 1 Clark, 315; Shephard v. Merrill, 3 John. Ch. 423.
(1) Story Eq. Pl. § 887.

- parties apparent.

By Order made want of proper parties, the Court will allow the cause to stand at the Hearing. over, for the plaintiff to amend his bill by adding parties (c), or, Where defect where the parties are too numerous to be brought before the Court, to alter the form of the bill, by making it a bill by the plaintiffs on behalf of themselves and others (f). This practice is not confined to amendment, by adding parties; we have seen that it will be extended to permit the plaintiff to show why he cannot bring the necessary parties before the Court, &c. (g).

Where matter not put in issue with sufficient certain-

So also, where a matter has not been put in issue, with sufficient precision, the Court has, upon hearing the case, given the plaintiff liberty to amend the bill, for the purpose of making the necessary alteration (h). And so, as we have seen, the Court will sometimes at the hearing permit the prayer of the bill to be amended, so as to make it more consistent with the case made by the plaintiff than the one he has already introduced (1). And where a plaintiff had amended his bill, and by accident had omitted to insert in the amended bill the prayer for relief, although it was in the original bill, the Court has put off the cause in order that the plaintiff might have an opportunity to re-amend his bill by inserting it (i).

Where prayer inconsistent with case made.

Where imof infants. Where infant heir at law made co-plaintiff.

Wherever improper submissions have been made in a bill on proper submis-sions on behalf behalf of infants, the Court will, at the hearing, order that the bill shall be amended by striking out the submission (k). Upon the same principle, where an infant heir at law had been made a coplaintiff, Lord Redesdale ordered the cause to stand over, with liberty to the plaintiff to amend his bill, by making the heir at law a defendant (1); and where a matter has not been put, by the bill, properly in issue, to the prejudice of the defendant, the Court has generally ordered the bill to be amended (m). The Court At the hearing has even gone to the extent of allowing the plaintiffs, at the hear-

of an appeal.

⁽c) Ante, p. 341. (f) Ante, p. 293. (g) Milligan v. Mitchell, 1 M. & C. 511. Harding v. Cox, 3 Atk. 583. (k) Serle v. St. Eloy, 2 P. Wms. 386; ante, 96. (1) Plunket v. Joice, 2 Scho. & (h) Lord Red. 326, cites 2 Bro. P. C. 194, sed vide Filkin v. Hill, 4 Bro. Lef. 159. (m) Lord Red. 327. P. C. (Ed. Tomline) 640.

⁽¹⁾ Clifton v. Haig, 4 Desaus. 330, cited post, 482, in note; Lyon s. Tallmadge, 1 John. Ch. 184.

But where a vendee of land has brought his bill for the recission of the contract, he will not be permitted to change the prayer of his bill and claim a specific execution thereof to the prejudice of a subsequent purchaser. Williams v. Starke, 2 B. Monroe, 196, 197.

ing of an appeal, to amend their bill, by converting it from a bill By Order made at the Hearing. into an information and bill (n) (1).

It frequently happens that, upon the argument of a demurrer, Upon arguthe Court, where the ground for demurring can be removed by ment of deamendment, has, in order to avoid putting the plaintiff to the expense of filing a new bill, instead of deciding upon the demurrer, given the plaintiff liberty to amend his bill on payment of the costs incurred by the defendant; because, after a demurrer allowed to the whole bill, the bill is so completely out of Court that no amendment can take place (o) (2); and where the demurrer is for want of parties, the Court, in general, annexes to the order allow- Where demuring the demurrer a direction that the plaintiff shall be at liberty rer for want to amend his bill by adding parties thereto, provided they so amend within the usual period (3).

Sometimes the Court has even, upon the hearing of an interlo- Upon an intercutory application, allowed the plaintiff to amend his bill, so as locutory applito afford him a ground for making such application. Thus, where a motion was made on the part of a plaintiff for a defendant to produce a deed, before an examiner, the possession of which by the defendant was not admitted by the answer, in consequence of no allegation having been inserted in the bill that it was in his possession, Sir J. Leach, V. C., and afterwards Lord Eldon, upon application, gave the plaintiff leave, though the cause was at issue. to amend the bill for the purpose of obtaining that admission (p).

But although the Court will sometimes, at the hearing, allow the case to stand over, with liberty for the plaintiff to amend his

(n) President of St. Mary Magda-len v. Sibthorp, 1 Russ. 154. (a) Lord Coningsby v. Jekyll, 2 P. Wms. 300; S. C. 2 Eq. Ca. Ab. 59; Smith v. Barnes, Dick. 67, vide etiam, Mason v. Lake, 2 Bro. P. C.

495, 497; Bresseden v. Decreets, 2 Cha. Ca. 196, ante, 460-466; vide Lloyd v. Loring, 6 Ves. 773. (p) Barnett v. Noble, 1 Jac. & W. 227.

(3) A bill may be amended on payment of costs after a demurrer for want of parties and argument. Marshall v. Lovelass, Cam. & Nor. 239, 264; Benzein v. Lovelass, ib. 520.

⁽¹⁾ Leave will be granted to amend in the Court of Appeals, if it there be found necessary, in order to let in the whole merits of the case. Lenoir v.

Winn, 4 Desaus. 65; Rodgers v. Jones, 1 M'Cord Ch. 226; M'Kim v. Odom, 3 Bland, 407; Drummond v. Magruder, 9 Cranch, 122.

(2) After a special demurrer to a bill, the plaintiff may have leave to amend, on payment of costs. Rose v. King, 4 Hen. & Munf. 475. So where a mere formal objection to a bill was made by demurrer ore tenus, the plaintiff was permitted to amend. Garlick v. Strong, 3 Paige, 440. So also upon the allowance of a demurrer for want of equity, upon the ground of a formal defect in the bill. M'Elwain v. Willis, 3 Paige, 505; Hunt v. Rousmaniere, 2 Mason, 342; Beauchamp v. Gibbs, 1 Bibb, 483.

After Plea or bill, the plaintiff ought to be careful before the cause comes on to have the record in a proper state, to enable the Court to make a complete decree upon the point; for, as we have seen, the plaintiff himself cannot, when the cause comes on for hearing, (unless under particular circumstances, or with the consent of the defendant.) obtain leave to amend his bill, even upon the usual terms of paying the costs of the day (1); and if a decree were to be obtained upon the pleadings, which are defective in a material point, it would afterwards be liable to be set aside for error.

Leave to amend after plea allowed. not granted of course.

Even where plea to part only.

But must be subject of special motion.

Specifying the amendments. &c.

Order to amend, pending judgment of plea, irregular.

It is stated, in the Treatise on Pleadings (q), that liberty to amend a bill, after allowance of a plea, may be obtained according to the common practice of the Court; but it must not be understood from this that the granting of such liberty to amend is by any means a matter of course, even where the plea covers only part of the bill. This was decided in Taylor v. Shaw (r), where a motion to amend after plea allowed was made, as of course, but the registrar having refused to draw up the order, the plaintiff moved, upon a general notice (supported by an affidavit, stating that the settled account was erroneous, and generally that he could introduce divers charges whereby he could falsify and displace the alleged stated account), but Sir J. Leach, V. C., required that the plaintiff should serve a new notice of motion. in which he should state the particulars of the amendments he proposed to introduce into the bill; and upon that being done. his Honor dismissed the motion, with costs, because the proposed amendments went no further than, either to show that, in fact, the plea was not true, or that if it were true the plaintiff ought to be be permitted to surcharge and falsify it; and his Honor was of opinion that if the plaintiff meant to disprove the plea he must go to issue upon it: and it would be useless to permit him to introduce new matter to that effect in his bill, because the plea protected the defendant from answering it; and if the plaintiff meant to make a new case, which would avoid the effect of the plea, and be consistent with it, he ought to have moved for leave to amend before the argument of the plea, and it was then too late to do so.

It may be observed in this place, that where a plea for want of parties was put in to a bill of discovery, which had been filed in (a) Lord Red. 281.

⁽r) 2 S. & S. 12; see 48th Ordet, 1845, and post, Ch. on Pleas.

⁽¹⁾ Leave may be granted to amend the prayer of the bill after hearing.

Clifton v. Haig, 4 Desaus. 330.

If a formal charge of fraud were necessary, but had been comitted, the Court would give leave to amend even at the hearing. Wamburzee v. Kennedy, 4 Desaus. 480.

aid of an ejectment at Law, on the ground that the trustees in After Plear or whom the legal estate was vested were not co-plaintiffs with the cestui que trusts, and upon argument a case was sent for the opinion of a Court of Law, but the parties not being able to agree upon the case, the bill was amended by adding the trustees as coplaintiffs, Lord Eldon discharged the order to amend for irregularity, as having been obtained while the judgment on plea was pending (t). Afterwards, however, upon the plaintiffs moving that the Vice-Chancellor's order directing the case to be stated might be discharged, and that the plaintiff might be at liberty to amend this bill by the introduction of facts to show that the legal estate was in the trustees, and that there was a count in the declaration in ejectment on the demise of such trustees, the Lord Chancellor made such an order, but upon condition of the plaintiff's consenting to the plea being allowed (u).

It seems that, where a plea has been replied to, the plaintiff Where plea may in some cases have leave to withdraw his replication and replied to, amend, but that such leave is not a matter of course, and can on-draw replicaly be obtained on a special motion (x); and therefore where an amend must be order to withdraw replication to plea, and amend, was obtained as on special apa motion of course, it was discharged for irregularity, and the plication. amended bill taken off the file.

It was, before the Orders of 1839, a matter of considerable doubt when a plaintiff had obtained the common injunction for want of answer whether he could under any circumstances amend his bill, by order as of course, without losing the benefit of the injunction; it seems clear that he could not have done so after answer put in by the defendant (y), but that before answer he might have obtained as of course, an order to amend his bill without prejudice to the injunction (b): as the practice is now settled by the 60th Order of October, 1845, it is not necessary to refer further to the cases: by this Order the plaintiff in any injunction cause having obtained the common injunction to stay proceedings at Law, may (either before or after the answer of the defendant is put in, and whether such injunction be or be not continued to the hearing of the cause) obtain one order as of course to amend his bill without prejudice to the injunction.

⁽t) Ld. Cholmondeley v. Clinton, 2 Mer. 71.

⁽u) Ibid. 74. (z) Carleton v. L'Estrange, 1 Turner & R. 23; and see 50th Order of May, 1845.

⁽y) Vide Mason v. Murray, 2 Dick.

^{536;} Lord Delvin v. Smith, Moseley, 204, and Eden on Injunctions, 120; Bliss v. Boscawen, 2 V. & B. 102

⁽b) Ferrand v. Hamer, 4 M. & C. 143; Brooks v. Purton, 1 Y. & C. 271.

judice to an Injunction.

Without Pre- And if such bill be amended pursuant to such order, such defendant may thereupon, although he may not have put in his answer to the bill or the amendments thereof, move the Court on notice to dissolve the injunction, on the ground that the bill as amended does not, even if the amendments be true, entitle the plaintiff thereto. This Order is, in all respects, the same in terms as the 2nd Order of May, 1839, now discharged, with the exception that the last mentioned Order required that the order to amend should contain an undertaking on the part of the plaintiff to amend within one week from its date; the necessity for such an undertaking is now done away with by the 16th Order, Art. 35, which imposes upon the plaintiff the same liability, without his entering into a special undertaking.

Previous to those orders, the Court went to the extent, under

Special applications.

particular circumstances, of permitting on a special application the reamendment of a bill, without prejudice to the common injunction, where the merits of the case had not been brought under the consideration of the Court; as the last-mentioned Order does not seem to apply to a second amendment, the former practice will probably still be continued, in accordance with which the Court required it to be clearly shown by affidavit, that the plaintiff had no knowledge of the facts proposed to be stated in the amendment, so as to have been able to bring them sooner upon the record. The doctrine upon which the practice of requiring an affidavit in cases of this nature is thus stated by Lord Eldon (c): "The principle of requiring the case for the injunction to be put upon the record immediately is, that the party, the prosecution of whose demand at Law is to be delayed by the injunction, shall be delayed as short a time as can be consistent with justice; but that principle is not contraverted where a plaintiff is not informed that an equity exists, which would entitle him to relief; no blame can attach upon him for not putting it upon the record until he knows it; but as soon as he knows it he must put it on the record. In the case cited (d), I think the information was obtained not from the record, but aliunde: it is not material for this purpose how the plaintiff procures the information even though unduly obtained; but if he gets it from the answer, the Court must know, from the bill and answer, that he cannot have as much benefit as if he had asked further questions. In that case, therefore, the Court required to know what were the proposed amendments; whether they were material, and if mate-

Principle of the practice.

⁽c) Sharp v. Ashton, 3 V. & B. 148. (d) Mair v. Thelluson, ibid. notis.

rial, to have ascertained by clear and positive affidavit that they Without Prorelated to facts of which the plaintiff had not a knowledge, enabling him to bring that case upon the record sooner. All these facts must be substantiated" (1).

judice to an Injunction.

There is one case, however, in which the Court has always per- When answer mitted the amendment of a bill without prejudice to an injunc- ficient. tion already obtained, where the injunction has not been supported upon merits or any affidavit, without requiring or calling for a specification of the amendments to be made, and that is where the defendant has put in an answer, which has been reported insuffieient upon the argument of exceptions; in such case the Court, as a matter of course, gave the plaintiff leave to amend his bill Leave to without prejudice to the injunction, and required the defendants amend without to answer the amendments and exceptions at the the same given. time (2).

reported insuf-

An order to this effect was obtained upon motion or petition, without notice, as soon as the Master's report upon the exceptions was filed, and an amendment of the bill under its authority did not prejudice the injunction (e), even though the order did not express it to be "without prejudice" (f).

As an insufficient answer is, for many purposes, treated as no Effect of reanswer, the order to amend in such cases may be considered as obtained before answer, and consequently the fact of its being made without prejudice to the injunction was not an exception to the general rule, but immediately resulted from the liberty which the plaintiff had of amending without prejudice to an injunction before answer (g). It will be recollected that the 60th Order of May, 1845, does not allow more than one amendment, without prejudice to the injunction, either before or after answer; it would seem therefore that excepting to the answer will not hereafter give any additional power to a plaintiff to amend without prejudice to the injunction.

⁽f) Adney v. Flood, 1 Mad. 449; 143.

pper v. Durant 3 Mar. 466 (e) Mayne v. Heckin, 1 Dick. 955. Dipper v. Durant, 3 Mer. 465.

⁽¹⁾ Rodgers v. Rodgers, 1 Paige, 424, cited ante, 469, note 2; see also, ante, 454, in note.

⁽³⁾ See Renwick v. Wilson, 6 John. Ch. 81; M'Mechen v. Story, 1 Bland, 184; Barnes v. Dickinson, Dev. Eq. 326; Read v. Consequa, 4 Wash. C. C. 174.

Under the general rule, allowing the plaintiff to amend, upon an insufficient answer, he cannot amend by leaving out the name of the defendant, and thus discontinue the suit against him, without costs. Chace v. Dunham, 1 Paige, 572.

Without Prejudice to an Injunction.

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As, however, there has been no decision upon the point, it will be convenient to state here the practice with respect to orders. enabling the plaintiff to amend, and requiring the defendant to answer the amendments and exceptions at the same time. first place, an order of this nature prevents the defendant from taking exceptions to the Master's report upon the sufficiency of the answer, provided it be served before the exceptions are set down; and the mere filing of the exceptions is of no avail, unless the order for setting them down is actually made and served before service of the order for leave to amend (h). And so where a bill has been already amended under such an order, and exceptions are taken to the answer to the amended bill, and are allowed, the plaintiff may have a further order to amend, and that the defendant may answer the amendment and exception at the same time; and such order may be obtained, ex parte, without previous notice (i).

After exceptions allowed.

After submission to exceptions;

plaintiff must wait till report has been filed;

he may move to dissolve. An order of this nature may also be obtained where a defendant, after exceptions are taken, submits to answer them (k), and in either case the Court permits the amendment to be made without costs.

Where the defendant does not submit to the exceptions, and they are allowed upon argument, the plaintiff must wait till the report upon the exceptions has been filed before he procures the order to amend, &c., otherwise his order may be discharged for irregularity (1). It requires, however, the exercise of some diligence on the part of the plaintiff's solicitor to obtain and serve this order in sufficient time to render it available; for if the defendant, even after the motion has been made, contrives to put in an answer' to the exceptions before the order has been drawn up and served, it will be regular (m); and the defendant may, upon the coming in of his further answer, move to dissolve the injunction, which must in such case stand or fall by the original bill, and the answers thereto (n). And where exceptions were taken to an answer to an injunction bill, and allowed, and the defendant put in a further answer before the plaintiff obtained the order to amend, (which however he obtained and served on the same day), Sir T. Clarke, M. R., upon motion, held that part of the order, which

⁽A) Farquharson v. Balfour, Jac. Sim. 33; Job v. Barker, 2 Swan, 255.

(m) Bethuen v. Bateman, 1 Dick.

⁽i) Mendizabel v. Hullett, 1 Russ. & M. 324; Bird v. Hustler, ib. 325.

⁽k) 1 Har. 62, Ed. 1808. (l) Dixon v. Redmond, 2 Sch. & Lef. 515; Rushton v. Troughton, 2

Sim. 33; Job v. Barker, 2 Swan, 255. (m) Bethuen v. Bateman, 1 Dick. 296; Knox v. Symmonds, 1 Ves. J. 87; Patty v. Simpson, 2 Cox, 392; Partridge v. Haycraft, 11 Ves. 570-578.

⁽n) Mayne v. Hochin, 1 Dick. 255.

judice to an

directed the defendant to answer the amendments and exceptions Without Preat the same time to be wrong, and discharged it (o).

Injunction.

It is to be observed, that where a plaintiff has duly obtained and served an order to amend, and that the defendant may answer where order obtained, he the amendment and exceptions at the same time, the original and cannot move amended bill become one record, and the defendant must fully without answering fully. answer both before he can move to dissolve the injunction (p).

The 60th Order of May, 1845, allowing one amendment without prejudice to an injunction, applies exclusively to common injunctions; but it has always been the practice of the Court, where an injunction was originally granted upon affidavit of merits, to allow a motion to amend, without prejudice to the injunction to be obtained as of course (q). As the 35th Art. of 16th Order, 16th May, 1845 (r), requiring the amendment to be made within seven days after the order in an injunction cause, simply uses the term "injunction," without specifying whether a common or special injunction is intended, it may be doubted whether the plaintiff is not bound to amend within seven days from the date of the order in a cause where a special injunction has been granted. Special injunc-When, after one amendment in such a cause, the plaintiff has tion. to apply specially for leave to amend a second time, it would seem that it would be necessary for him to establish that the amendments relate to facts, of which the plaintiff had no knowledge, to have enabled him to bring them sooner before the Court (s).

It may be observed, that from the case of the Attorney-general v. Cooper (t), it appears, that the fact of an irregular amendment having been made under a common order to amend, will not be a sufficient reason for ordering the bill to be taken off the file, if the record can be restored to the state in which it was before such irregular amendment was made.

Where the plaintiff amends his bill after answer, without requir- Where no aning any further answer, the order ought to contain a recital to that swer required. effect, otherwise it is irregular (u).

If the amendment be before answer, it seems that no additional Where answer subpana need be served upon the defendant, but he is entitled to is required.

 $(\hat{r})$  See page 469.

⁽o) Bethuen v. Bateman, 1 Dick. (s) Sharp v. Ashton, 3 V. & B. 144. (t) 3 M. & C. 258.

⁽p) Mayne v. Hochin, ubi supra. (ú) Boddington v. Woodley, 9 Pratt v. Archer, 1 S. & S. 433. Sim. 380.

Without Prejudice to an Injunction.

the full time for answering, from the time when he is served with notice of the amendment (z) (1).

If the amendment be after answer, and a further answer be required, a subpæna must be served, but service upon the defendant's solicitor is sufficient (y) (2).

(z) 16th Order, May, 1845, Art. (y) 26th Order, May, 1845, and see 14.

⁽¹⁾ See Cunningham v. Pell, 6 Paige, 655; Lawrence v. Bolton, 3 Paige, 294.

⁽²⁾ Where a bill is amended, process need not be issued against the defendants, who being in Court, have notice of the amendments, and are subject to the orders of the Court. Longworth v. Taylor, 1 M'Lean, 514.

### CHAPTER VII.

### PROCESS BY SERVICE OF A COPY OF THE BILL.

As soon as a bill has been filed, the plaintiff may proceed to bring before the Court the proposed defendants to the suit. We have seen, however, that it is not necessary that all who are to fill this character, should be adverse to the plaintiff, or interested in resisting the decree sought to be obtained.

To save the expense occasioned by persons in this position, going through all the forms of pleading and appearing before the Court, when any question in the cause is determined, an Order (a) has recently been issued, by which the plaintiff is enabled, as against such parties not being infants, to dispense with the ordinary process of the Court, upon serving them with a copy of the bill, and thereupon, in the event of their not voluntarily appearing after such service, the plaintiff is enabled to proceed without further attention to their rights or interests (b).

As against all the other defendants, the plaintiff must proceed by compelling appearance and answer. It will, however, be convenient to consider, in the first place, the precise effect of the recent Orders relating to persons from whom no direct relief is sought, and then, secondly, the ordinary process against other defendants.

By the 23rd Order, of August, 1841, it is directed, that where Persons no account, payment, conveyance, or other direct relief is sought against whom against a party to a suit, it shall not be necessary for the plain-prayed. tiff to require such party, not being an infant, to appear to and answer the bill. But the plaintiff shall be at liberty to serve such party, not being an infant, with a copy of the bill, whether the same be an original or amended, or supplemental bill, omitting the interrogating part thereof; and such bill, as against such party, shall not pray a subpæna to appear to answer, but shall pray that such party upon being served with a copy of the bill, may be bound by all the proceedings in the cause. But this Order is

⁽a) (23rd) August, 1841.

⁽b) 25th Order, August, 1841.

ing Service.

Mode of Effect not to prevent the plaintiff from requiring a party against whom no account, payment, conveyance, or other direct relief is sought, to appear and answer the bill, or from prosecuting the suit against such party in the ordinary way, if he shall think fit.

> A plaintiff availing himself of the privilege conferred by this Order, must, in the first place, cause copies of the bill, omitting the interrogating part, to be made, which should either be examined with the original engrossment, filed in the Record and Writ Office, or with some other document capable of being proved to have been previously compared with it (c). One copy, so compared and examined, must then be served upon each one of such defendants, with the exception that, in the case of husband and wife, service upon the husband alone is sufficient (d). The service must be within the jurisdiction of the Court; or, if service without the jurisdiction is required, a special order for that purpose should be obtained by motion (e). With respect to the time when the service of a copy of the bill may be effected, the 16th Order of May, 1845, Art. (2), has provided that the service " is to be of no validity, if not made within twelve weeks from the filing of the bill, unless the Court shall give leave for such service to be made after the expiration of such twelve weeks;" and, by the 28th of the same Orders, the Court is enabled, if it shall think fit, after the twelve weeks, upon motion of the plaintiff, without notice, to give him leave to make such service within such time and upon such terms as to the Court seem just.

Time within which it may be effected.

Entering memorandum of service.

In any case, after service has been effected, the next step to be taken, is for the plaintiff to apply to the Court, by motion, without notice, for leave to cause a memorandum of such service, and the time when it was made, to be entered in the Record and Writ Clerks' Offices; and by the terms of the Order, this motion will be granted "upon the Court being satisfied of a copy of the bill having been so served, and of the time when the service was made" (f).

Proof required.

There have been several cases, and these somewhat conflicting, concerning the extent of information demanded by the Court. upon motions of this description; but the result seems to be, that no further proof is absolutely necessary, than what is pointed out by the Order itself, namely, proof by affidavit, first (g), that within the jurisdiction of the Court, due service has been effected upon

⁽c) Coleman v. Rackham, 3 Hare, 184. (f) 24th Order, August, 1841. (g) Coleman v. Rackham, 3 Hare, (d) Kent v. Jacobs, 5 Beav. 48. 184; Broughton v. Broughton, ibid. (e) Warren v. Postlethwaite, 1 335. Collyer, 171.

each of the defendants of a copy of the bill, sworn to be a true Proof required copy of the bill itself, omitting the interrogating part; secondly enter Memo-(A), proof of the time and place when and where such service was random of Sermade, so that the Court may know that it has been effected within the jurisdiction. Where a party served with a copy of the bill had subsequently appeared, it was considered an admission of due service, and no further evidence was required (i). Proof has in some cases been demanded of the fact, that the person upon whom such service was made, was not an infant (k), and that the bill did not pray an account, payment, conveyance, or other direct relief against such person, but the terms of the order do not seem to render it necessary that these facts should be established upon the motion, and the recent cases are against the necessity for giving proof of them (1). The plaintiff would seem to take the order at his own risk; and if the case be one in which he is not entitled to proceed in this manner, the whole process would be nugatory, and the defendant would not be bound by any of the proceedings in the cause (m).

The 23rd Order (2) merely confers upon the plaintiff the privilege of adopting this course, but it is not obligatory upon him, and he may, if he thinks fit, compel such parties to appear and answer, and in other respects prosecute his suit against them in the ordinary manner; but the costs occasioned by such a course must be paid by the plaintiff, unless the Court shall otherwise direct (a).

A question of considerable difficulty must frequently arise, in To what pardetermining to what parties the 23rd Order applies; for the ob-ties the process ject of a bill may be such as that it virtually seeks direct relief against a defendant, although the prayer does not do so in express The cases upon the Order are few, and it is not possible to deduce from them any clear rule upon the subject, but it appears that the Order would not in general be considered as applicable. where the interest of the defendant is adverse to that of the plaintiff, even though no further relief is sought against the defendant, than the binding of his rights by a decree.

In the case of Marke v. Locke (p), the bill was filed by a par-

(A) Warren v. Postlethwalte, supra.

⁽i) Maude v. Copland, 1 Col. 505.

⁽k) Goodwin v. Bell, 1 Y. & C. 181; Haigh v. Dixon, 1 Y. & C. 180; Davis v. Prout, 5 Beav. 102.

⁽i) Sherwood v. Rivers, 2 Y. & C. 166; Mawhood v. Labouchere, 12 Sim. 362.

⁽m) 2 Y. & C. 506. (n) August, 1841. (o) 29th Order of August, 1841. (m) 2 Y. & C. 500.

ties the process applies.

To what Par- tv asserting an equitable title to a customary estate, and it prayed the establishment of his equitable title, and the assurance to him of the legal estate. The plaintiff's title was claimed in respect of his alleged character of heir according to the custom. were, however, various constructions suggested of the custom, and accordingly various claimants; these claimants were added as parties, but not served with subpænas, and the question arose whether such claimants were parties against whom no direct relief was sought within the meaning of the 23rd Order. Knight Bruce, V. C., decided that they were not so. case of Adams v. Fisher (q), it was decided that judgment creditors whose judgments had been entered up subsequent to a mortgage, were parties against whom direct relief was prayed by a bill to foreclose the mortgage, and consequently that they could not be served with copies of the bill. Barkley v. Lord Reay (r), was a suit against the trustees of real estate, having the legal fee and full powers of sale, and the object was to raise a legacy charged upon the estates. Sir J. Wigram, V. C., decided, that the equitable tenant in tail was a necessary party, and that it was not sufficient to serve him with a copy of the bill under the 23rd Order, observing the substantial purpose of the suit is to sell the settled estate, and that is direct relief against the tenant in tail, although the prayer may not express it in terms. The 23rd Order was not intended to apply to such a case. object of the order was to relieve suitors from the necessity of having numerous parties in the same interest, against whom no relief is prayed, uselessly appearing in the cause; on the other hand Sir J. L. Knight Bruce, V. C., in a suit by creditors for administering the real estate of a testator, expressed his opinion that the devisees whose title was subject to a power of sale given to trustees by the will for the purpose of paying debts, were persons against whom no direct relief was sought within the meaning of the order (s).

Entering memorandum of service.

If the motion for leave to enter a memorandum of service in the Office of the Clerk of Records and writs be granted, the order made upon the motion must be drawn up, passed, and entered, and should then be left with the Record and Writ clerk in whose division the cause is. It is then entered by him in his cause book. and returned to the solicitor with an endorsement upon it, to show

⁽q) 1 Col. 530. (r) 2 H. 306.

⁽s) Lloyd v. Lloyd, 1 Y. & C. 181.

that the memorandum has been entered. The order should be Appearance by kept for the purpose of production at any subsequent period of the with a Copy. cause, when the regularity of service and the entry of the memorandum are required to be established.

It would appear from the terms of the 23d Order of August, 1841, that if any amendment of the bill is made after the service of the copy of the original bill as above, or if any supplemental bill is filed against the defendants so served, it would be necessary to serve the defendants with a copy of such amended or supplemental bill in addition to the copy of the original bill (t).

A person so served with a copy of the bill, may, if he desires the suit to be prosecuted against himself in the ordinary way, enter an appearance for himself in the common form, and in this case the plaintiff must proceed against such defendant in the ordinary way, but the costs occasioned thereby must be paid by the party so appearing, unless the Court shall otherwise direct (u).

A party so served may also, if he is desirous of being served with a notice of the proceedings in the cause, but not of otherwise having the suit prosecuted against himself, enter a special appearance under the following form :-

"A. B. appears to the bill for the purpose of being served with notice of all proceedings therein."

In this case he must be served with notice of all proceedings in the cause, and he is entitled to appear upon them, but he will have to pay the costs (z) occasioned thereby, unless the Court should otherwise direct.

With respect to the time when such common or special appearances may be entered, it is provided that a defendant may, within twelve days after service upon him of a copy of the bill, enter a common or special appearance under the above orders. If he does not do so, he cannot afterwards enter either the one or the other without leave of the Court, and he is bound by the proceedings in the cause, unless the Court otherwise directs (y), in the same manner as if he had appeared to and answered the bill. To obtain such leave, he must move upon notice to the plaintiff, and the Court, if it thinks fit, may make the order Costs upon such terms as are just (z).

If the plaintiff shall not proceed by service of a copy of the bill against any party from whom no account, payment, conveyance,

⁽t) 26th Order of August, 1841.

⁽a) 26th Order of August, 1841. (z) 27th Order of August, 1841.

⁽y) 16th Order of May, 1845, Art. 5; 25th Order of August, 1841.

⁽z) 37th Order of May, 1845.

Appearance by or other relief is sought; the costs occasioned by the plaintiff hav-Parties served ing required such party so to appear and answer the bill, and the costs of all proceedings consequential thereon shall be paid by the plaintiff, unless the Court shall otherwise direct (a).

(a) 29th Order of August, 1841.

# CHAPTER VIII.

#### OF PROCESS TO COMPEL APPEARANCE.

### Section I.—Issuing the Writ of Subpara (1).

HAVING now considered the manner in which the plaintiff may proceed against certain defendants of a particular description by service upon them of a copy of the bill, the next subject of investigation is the ordinary mode of proceeding against all other defendants. The first step usually is, to sue out and serve a subpæna, which is a writ issuing out of the Court, and directed to the party himself, commanding him to appear (according to the old form of the writ) under a certain penalty therein expressed, Why so (subpæna centum librærum), and answer to the matters alleged against him. This writ is frequently called the first process of the Court, but the term process is more properly applicable to those proceedings which are subsequently resorted to for the purpose of compelling obedience to the subpæna, in the same manner that the term process at Common Law is applied, not to the original writ, (which is that part of their proceedings which answers to the subpæna in Equity), but to the writs which are issued in case the defendant, upon being duly warned to obey the original writ, refuses to do so (a). And it is to be observed, that the writ of subpana differs from the other writs of process, in being directed to the party himself, whereas the subsequent writs or orders are directed, not to the party himself, but certain ministerial officers, commanding them to take certain proceedings against the defendant, calculated to enforce his obedience.

The Attorney-general, being an officer of the Crown, and supposed to be always in Court, is merely attended with a copy of

(a) 3 Bl. Com. c. xix.

⁽¹⁾ It would seem, according to the American practice, that the bill ought in all cases to be filed before or at the time of issuing the subpæna. 1 Hoff. Ch. Pr. 101 note; ante, 454, note; Rule 3rd of the Rules of Practice in Chancery in Massachusetts.

pœna. Not issued torney-general, nor against peers of the realm, in the first instance.

Form of Sub- the bill; a letter missive is addressed to peers and peeresses, before service upon them of a subpæna, with these exceptions, —the writ must be issued and served upon all the parties defendants to against the At- a bill before a cause can be properly said to be commenced.

The writ of subpana is prepared by the solicitor, and is now in the following form, according to the Orders of May, 1845:-

"To appear and answer, or to appear only when the writ is to be served on a defendant (or defendants) within the jurisdiction."

"Victoria, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith. greeting. We command you (and every of you where more than one defendant) that within eight (b) days after service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in Our High Court of Chancery to a bill (or as the case may be an information, or amended bill, or information, bill of revivor and supplement, or supplemental bill,) (and others or another), and filed against you by that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of an attachment issuing against your person, and such other process of contempt as our said Court shall award. Witness Ourself, at Westminster, the day of in the year of our reign.

"DEVON."

### ( The following memorandum is to be placed at the foot) -

"Appearances are to be entered at the Record and Writ Clerks' Office, in Chancery Lane, London, and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you at your expense, and you will be subject to an attachment against your person, and such other process as the Court shall award, and to such order and decree being made against you as the Court shall think just upon the plaintiff's own showing."

In addition to the memorandum, the solicitor suing the writ shall cause to be endorsed his name or firm, and place of business, and also (if his place of business shall be more than three miles from the Record and Writ Clerks' Office) another proper place, to be called his "address for service." which shall not be more than three miles from the Record and Writ Clerks' Office, where writs,

⁽b) 22nd Order of May, 1845.

notices, orders, warrants, rules, and other documents, proceed- Form of Subings, and written communications may be left for him. And where any such solicitor shall only be the agent of any other solici- Endorsement. tor, he shall add to his own name or firm and place of business, the name or firm and place of business of the principal solicitor (c). When a party sues in person, he must in like manner endorse his place of residence upon the writ (d).

In addition to the preparation of the subpana, the plaintiff's Practipe. solicitor must prepare a præcipe, which is in the following form: -

"In Chancery. — Subpæna. A. B., C. D., and E. F. to appear , at the suit of in Chancery, returnable the day of G. H., (or 'G. H. and another,' or 'others')" (e). And the præcipe must also further state the name or firm, and the place of business or residence of the solicitor or solicitors issuing the writs; and where such solicitors are agents only, the name or firm and place of business or residence of the principal solicitor or solicitors (f).

The writ of subpæna and the præcipe may then be taken to the Subpæna Office, where the writ is sealed and delivered to the solicitor. The præcipe is left at the office to be filed. By the 24th Order, of May, 1845, the seal for sealing the subpæna is marked with the words, "Subpæna Office, Chancery." The names of three persons, but no more, may, when necessary or required, be inserted in one subpæna (g), with the exception that a husband and wife are, for the purposes of this Order, considered as one person (h),

It has before been stated that a subpæna is not, in the first instance, issued against a defendant who claims the privilege of Against peers. the peerage. All peers of the three kingdoms, with or without a seat in the Upper House (i), (provided they are not members of the House of Commons), and the widows and dowagers of the temporal lords (k), are entitled, before a subpæna is issued against them, to be informed by a communication from the Lord Chancellor, termed a Letter Missive, of the fact of the bill having been filed. To obtain this letter missive, a petition for that purpose to the Lord Chancellor must be left with his Lordship's sec-

⁽c) 3rd Order of December, 1833;

¹⁷th Order of October, 1842.
(d) 20th Order of October, 1842, see post, p. 513.
(e) 2nd Order of December, 1833.

⁽f) 3rd Order of December, 1833.

⁽g) 5th Order of December, 1833.(h) Prac. Reg. 400.

⁽i) Robinson v. Lord Rokeby, 8 Ves. 601.

⁽k) See post, note (u).

Sealing and Delivery of this Writ. retary, who will get the petition answered; upon which being done in the affirmative, the letter missive must be bespoken at the same office (1).

The letter missive is in the following form: -

"My Lord, "December, 184.

Letter missive.

"It appears, by a petition, a copy of which is herewith sent your Lordship, that A. B. has lately exhibited his bill of complaint in the High Court of Chancery, against your Lordship, and desires your Lordship's appearance to such bill forthwith; wherefore I do, at his request, according to the manner used to persons of your Lordship's quality, desire your Lordship to take knowledge thereof, and to give directions to those you employ in such matters, for your Lordship's appearance to the said bill accordingly.

"I am, my Lord,
"Your Lordship's humble Servant,

"To the Right Honorable the Earl of ----."

### SECTION II.

### Service of the Writ of Subpana.

When the writ or writs of subpæna have been thus prepared and sealed, the next step is to effect due service upon the defendants. By the 16th Order, of May, 1845, Art. (1), "the service of any subpæna, except a subpæna for costs, is to be of no validity, if not made within twelve weeks after the teste of the writ." After that time the writ is no longer in force; and during this period Sundays are excluded, on which days no service can be effected (n).

There are two kinds of service of the writ of subpæna and other writs, requiring what is called personal service. One, the ordinary service, which requires no leave from the Court; the other, extraordinary service, which requires a special Order of the Court to render it valid, and is not used except under special circumstances, when the ordinary service cannot be effected.

Ordinary service must be within the jurisdiction of the

(1) Hinde, 82.

(n) Mackreth v. Nicholson, 19 Ves. 367; [1 Hoff. Ch. Pr. 104, note (2)].

Court (1); and is effected either by delivering a copy of the writ Ordinary Serand of the endorsements thereon, to the person to be served, and at the same time producing the original writ, or else by leaving such copy at the dwelling-house of the person to be served, and at the same time producing the original writ to the person with whom such copy is left (q) (2).

When the copy is left at a dwelling-house, it is necessary that it should be the place where the defendant actually resides, and Must be at the mere leaving the writ or the copy at a defendant's ordinary place of actual place of business, if he does not reside there, will not be good ser- the time. vice (3); and therefore where, under the old practice, a subpana,

(o) 4th Order of December, 1833; 263, where subpana was sealed up in Earl of Chesterfield v. Bond, 2 Beav. a letter.

(1) The service of a subpana must be within the jurisdiction, otherwise it is irregular. Dunn v. Dunn, 4 Paige, 425; Creed v. Byrne, 1 Hogan, 79; Johnson v. Nagle, 1 Molloy, 243; Hawkins v. Hale, 1 Beavan, 73. But the defendant may voluntarily appear or stipulate in writing to accept such service as regular. Dunn v. Dunn, ubi supra. See Henderson v. Hopper, Halst. Dig. 170.

But in Tennessee, where service of a subpæna has been made upon one material defendant in the proper district or county, a subpæna may be served

upon any other defendant out of the county or district. University v. Cambreling, 6 Yerger, 79.

(2) The subpana may be served by any person. Trabue v. Holt, 2 Bibb, 393.

So in Maryland; but if the service is made by any other person but a legal officer, the service must be proved. Hoye v. Penn, 1 Bland, 29; Taylor v. Gordon, 1 Bland, 132. So in New Jersey. West v. Smith, 1 Green Ch. 309. But see Anon. 4 Hen. & Munf. 401.

In Vermont service of a subposna cannot be made by an indifferent person not named in it. Allyn v. Davis, 10 Vermont, 547; Burlington Bank v. Catlin, 11 Vermont, 106.

Service of a subpæna by leaving a copy at the defendant's residence, sealed up in a letter, at the same time producing the original, was held regular. Chesterfield v. Bond, 2 Beavan, 263.

(3) See Johnston v. Macconnel, 3 Bibb, 1.
A copy, left at the residence, is sufficient service of the subposta on a party domiciled in the state, and temporarily absent therefrom, unless it is made to appear that he has been surprised. Southern Steam Packet Co. v. Roger, 1 Cheeves, 48.

Where the defendant has no family, but boards or makes it his home in

the family of another, the subposns to appear and answer may, in his absence from home, be served upon either of the heads of the family, at such place of his abode, although he had no wife or servant. But to make such service regular, the place of service must be his actual place of residence at the time, and his absence therefrom must be merely temporary. People v. Craft, 7 Paige, 325. See Bickford v. Skewes, 9 Sim. 428.

The personal service of a subpœna on a defendant who is confined in the

State's Prison for a term of years is regular. Phelps v. Phelps, 7 Paige, 500. For service on a defendant under criminal sentence. See further, Newenham v. Pemberton, 2 Cott. 54.

The return to a subpana against A. and B. was as follows: "Executed on a, —B not found;" and this was held insufficient to found a decree. Pegg v. Capp, 2 Blackf. 257.

Ordinary Ser- returnable immediately, was moved for upon affidavit, stating that

Secus, in case of a Member of Parliament.

the defendant lived at Epsom, but that he had chambers in the Temple and resided there, Lord Thurlow said that as it did not appear that his place of abode was in the Temple, he could not make the order (p). Where, however, a member of the House of Commons having a house at Southampton and no town residence, was served with a subpæna, returnable immediately, at a friend's house in London, with whom he was upon a visit, and for default of appearance a sequestration had been awarded, and a motion was made at the instance of the defendant to set aside the sequestration for irregularity. Lord Thurlow said he could not suppose that the defendant, a member of Parliament, during the session of Parliament had no town residence, or that the residence above stated should not be taken as a residence quoad the defendant, whose duty it was to attend, and actually did attend, the House, and therefore refused to grant the motion. And so where a letter missive, and subsequently a subpæna, had been served at the town residence of a peer during the sitting of Parliament, Lord Thurlow appears to have been of opinion that it was good (q), and in a case where a letter missive, and afterwards a subpæna, had been served at the town residence of a peer, who at the time was abroad, and afterwards an order nisi for a sequestration was issued, the V. C. of England refused a motion to discharge the order nisi, his Honor's decision was confirmed by Lord Brougham (r).

Service at the town-house of a peer who is abroad good.

Upon an Infant.

Husband and wife.

Ordinary service upon an infant defendant is effected in the same manner as upon an adult (1).

Where a husband and wife are defendants, ordinary service upon the husband alone is sufficient (2); and process of contempt

(p) — v. Shaw, Hind. 92. (q) Attorney-general v. Earl of M. & K. 398; and see Davidson v. Stamford, 2 Dick. 744.

(r) Thomas v. Earl of Jersey, 2 M. & K. 398; and see Davidson v. Marchioness of Hastings, 2 K. 509.

Where a bill has been served on an infant, there is no necessity for serving the same again on the guardian ad litem after he is appointed. Jones s. Drake, 2 Hayw. 237.

Upon a bill against a lunatic in the custody of a committee, service of

process upon the committee is sufficient. Cates v. Woodson, 2 Dana, 455.

(2) See Leavitt v. Cruger, 1 Paige, 421. But if the bill seeks relief out of the separate estate of the wife, the service must be also made on her, and she may put in her separate answer. Ferguson v. Smith, 2 John. Ch. 139; Leavitt v. Cruger, ubi supra.

⁽¹⁾ Process ought to be served personally on infants. Massie v. Donalson, 8 Ohio, 377. But service of a subposta on the father of a minor defendant, if within the jurisdiction, was held sufficient, although the minor resided out of the jurisdiction. Kirwan v. Kirwan, 1 Hogan, 264. See the law of New York on this subject, 1 Barbour, Ch. Pr. 51, 52; Bank of Ontario v. Strong, 2 Paige, 301.

may then be awarded against the husband for default of the Ordinary Serwife (s).

When a bill is filed against a husband and wife, in respect of a demand out of the separate estate of the wife (t) (1); or in respect of an estate of a deceased person, of whom the wife is the personal representative (u), and the husband is abroad, it seems that service may be effected upon the wife: no compulsory process however can be issued against the wife, grounded upon such service, without a previous order of the Court (2).

If a corporation be defendant, the *subpæna* may be served upon Corporation. any one of its members (3).

If one of the defendants (x) be entitled to the privilege of peer-Peers. age, it has previously been stated that he has a right to a letter missive before a subpæna can issue against him. This letter missive, with a copy of the petition for the same and with an office copy of the bill, must be served in the same manner as a subpæna in ordinary cases; and if the bill be a supplemental bill, and pray that the defendant may answer that bill, and the original bill, office copies of both bills should be served (y). If the peer does not enter his appearance within eight days, the plaintiff is entitled to sue out an ordinary subpæna against him.

The Attorney-general is not served with a subp ena, but with a copy of the bill (z) (4).

By the 26th order of May, 1845, service upon a defendant's so-

- (s) Gee v. Cottle, 3 M. & C. 180. (t) Dubois v. Hall, 2 Vernon, 613.
- (t) Dubois v. Hall, 2 Vernon, 613. (u) Bunyan v. Mortimer, Mad. & Geld. 278.
- (z) Robinson v. Lord Rokeby, 8 Ves. 601.
- (y) Vigers v. Lord Audley, 9 Sim. 409.
  - (z) Lord Red. 39.

⁽¹⁾ See Dyett v. N. A. Coal Co. 20 Wendell, 570, and next note above.
(2) Where the plaintiff seeks relief out of the separate estate of the wife, the subpœna must be served on her personally, and she may put in a separate answer; the husband in such case being considered only a nominal party. Leavitt v. Cruger, 1 Paige, 422; Ferguson v. Smith, 2 John. Ch. 139.

⁽³⁾ The subpœna, in case of a corporation, is usually served on the president, cashier, secretary, or other principal officer.

⁽⁴⁾ Where the United States or a State is interested, the District Attorney or the Attorney-general must be served with a copy of the bill. If he omits to enter an appearance, an order may be obtained on petition, that he appear within a certain time, or the bill be taken as confessed. 1 Hoff. Ch. Pr. 108.

In Grayson v. Virginia, 3 Dall. 320, it was held that when process at common law or in Equity shall issue against a State, the same shall be served upon the Governor or chief executive officer, and the Attorney-general of such State.

Extraordinary licitor of a subpæna to answer an amended bill, or to hear judg-Service.

ments, to be deemed good service upon the party (1).

In the event of the plaintiff finding himself unable to effect ordinary service upon a defendant in the manners above mentioned; in the different cases respectively, he must consider whether there is any mode of extraordinary service applicable to his case to be obtained by special motion to the Court.

In order to determine this point, it becomes necessary to consider, 1st, what is the general jurisdiction and practice of the Court in ordering extraordinary service, independent of any Act of Parliament; and 2ndly, What additional jurisdiction has been given to the Court of Chancery by Statute Law.

Under general jurisdiction of the Court.

As to the general jurisdiction of the Court, it would seem, that independent of any statute, there is no power in the Court of Chancery to order actual personal service to be effected out of the jurisdiction, but that in some cases the Court has assumed the power of ordering a service to be effected within the jurisdiction, upon some person other than the absent defendant, and has treated such service as valid against him.

The cases upon the general jurisdiction of the Court, to order such substituted service, by no means establish a very clear principle, and recently, upon an application of this description, to Sir J. L. Knight Bruce, V. C., he made the fact of the conflicting decisions upon the subject a reason for recommending that the motion should be made in the first instance to the Lord Chancellor (a).

In cases of actions at law brought by a plaintiff abroad.

The jurisdiction is most frequently exerted where actions at Law are brought by persons resident abroad to enforce demands, which, although they have, strictly speaking, a legal right to make, it is against the principles of Equity to permit. In such cases, the Court will interfere by injunction served upon the attorney employed in this country to conduct the proceedings at Law, to restrain the further prosecuting of such proceedings until his employer has submitted himself to the jurisdiction (b) (1).

Order for, how obtained.

In order to accomplish this purpose, it is permitted to the plaintiff in Equity, in the first instance, to obtain an order, directing

(a) Noad v. Backhouse, 2 Y. & C.
(b) Per Lord Thurlow, Anderson
v. Lewis, 3 Bro. 429.

⁽¹⁾ Personal service, out of the jurisdiction, of a subpœna to hear judgment, or to show cause against a conditional decree, is good service. Nolan v. Nolan, 1 Moll. 243.

⁽¹⁾ See Seebor v. Hess, 5 Paige, 85.

that service of the subpana upon the attorney employed in the Substituted Service under the General this order must be supported by an affidavit, verifying the facts in Jurisdiction. the bill, usually denominated an affidavit of merits (c).

It seems that the affidavit in this case must be made by the Affidavit must plaintiff in Equity himself, and that unless the solicitor has per- be by plaintiff. sonal knowledge of the merits of the cause, his affidavit will not be sufficient (d). It has also been decided, that it is not necessary that the affidavit should state a previous refusal by the attorney to accept a subpæna (e).

A motion for substituted service, under these circumstances, is Notice of mogenerally made without notice; in the following case, however, sary. the Court of Exchequer held that notice was necessary. agent had effected a policy for his principal, who resided in Spain, and afterwards brought an action in his own name only against the underwriters and others, who filed a bill for an injunction against both the principal and agent; the agent appeared and answered, and in eight days the usual affidavit of merits was sworn, and a motion was made for an injunction against the principal; the counsel for the agent, however, objected to the motion for want of notice, and the Court held, that though in ordinary cases notice is not necessary, yet that it was in the present case, the action having been brought in the name of the agent only (f).

The Court, it is said, does not expect a plaintiff to verify all the Affidavit need allegations in his bill with the same precision that is required in the allegations, an answer: it will be sufficient if he substantiate the general heads of equity, which will entitle him to an injunction (g); but a ma-but material terial variance between the bill and the affidavit would be fatal. variance fatal. Thus where the bill stated that bills of exchange, which were the subject of the action, were lent for the defendant's accommodation, whereas the affidavit stated that they were given to the defendant to pay the balance of his account to the plaintiffs, which they afterwards found to be erroneous (h).

In one case, however, an affidavit of merits was dispensed with Affidavit of entirely. An agent had effected a policy for his principal who merits disresided abroad, and a bill was filed to restrain proceedings in an pensed with. action brought upon it; to which the agent put in his answer, ad-

(c) Delancy v. Wallis, 3 Bro. C. C. 12; and see Stephen v. Cini, 4 Ves. 359; Fullarton v. Wallace, ib. 360, n.; Anderson v. Darcey, 18 Ves. 447; White v. Klevers, ib. 471; Kenworthy v. Accunor, 3 Mad. 550; Baillie v. Larkens, cited ib.

(d) Kenworthy v. Accunor, ubi supra.

(e) French v. Roe, 13 Ves. 593. Crew v. Mertin, 1 Fowl. Ex.

(2) Nunes v. Jaffray, ib. 226. (1) Ibid; Wattleworth v. Pitcher, 2 Price, 189.

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mitting the material facts of the bill. An injunction was moved for upon these admissions, until the answer of the other defendant should come in, and an objection was made, that there ought to have been an affidavit; the Court, however, overruled it, and granted an injunction, considering the admissions equivalent to an affidavit (i).

Where action brought by assignee of bond.

It has been determined by the V. C. of England, that where the assignee of a bond brings an action upon the bond in the name of the assignor (the obligee) who is abroad, and the obligor institutes a suit in Equity, for the purpose of restraining such action, making the assignee and his assignor a party, the Court will make an order that service on the attorney in the action shall be good service on the obligee. Consequently, if he does not appear and answer the bill within the usual time, an injunction will be issued against him, to restrain the action until appearance and an-In Montagu v. Hill (1), Lord Lyndhurst expressed a doubt whether, notwithstanding an injunction of this nature against the assignor, the assignee might not have continued the action; but, with great deference to so great an authority, it is submitted that he could not, because the common injunction is not only directed to the party himself, but to his counsellors, attornies, solicitors and agents, and every of them; and it is to be recollected that all assignments of a chose in action, in order to be effective at Law, are accompanied by an appointment of the assignee to be the attorney of the assignor, &c.

Much more frequent formerly than now. The practice of ordering substituted service of process to be good service, where a defendant was abroad, appears formerly to have been permitted to a much greater extent than at present. Thus, in Hales v. Sutton (m), where defendants, who were executors living abroad, had given a letter of attorney to a person to prove a will, service on that person was held to be good; and in Carter v. De Brune (n), service of a subpona on a person who transacted matters under a letter of attorney from the defendant, was deemed good service (o). The authority of these cases, however, was disputed by Lord Redesdale, in Smith v. The Hibernian Mine Company (p), who refused a motion for an order that service upon a person acting under a power of attorney for a defendant should be good service; observing, that although Mr. Dick-

(n) Ibid. 39.

⁽i) Royal Exchange Insurance Co. v. Ward, 1 Fowl. Ex. Pr. 225.

⁽k) Lord Portarlington v. Graham,5 Sim. 416.

⁽l) 4 Russ. 128.

⁽m) 1 Dick. 26.

⁽o) Vide etiam, Anon. 1 P. Wms. 523.

⁽p) 1 Sch. & Lef. 238.

ens was a very attentive and diligent registrar, yet his notes were very loose, and not considered as of very high authority, unless Service under the General supported by the register books. Upon that occasion, Lord Jurisdiction. Redesdale referred to a cause argued before Lord Thurlow, under Not good these circumstances. In a mortgage a covenant was inserted, that even where if the mortgagee should be desirous of filing a bill of foreclosure covenant in after a certain time, service of a subpœna on a person there that it should named should be good service; and on that ground an applica- be so deemed. tion was made to Lord Thurlow to substitute service, the mortgagee having gone to the East Indies: but the answer of Lord Thurlow was, "I can no more try the fact whether there is such a covenant, without having the party before me, than I can decide any other facts without having the party before me (q)." In another case before Lord Thurlow (r), his Lordship said, that, for the purpose of an injunction bill, service upon the attorney at Law has been held good service but in no other case (1). In that Service on case there were a cause and a cross cause, and the plaintiffs in the clerk in court, not good in a original bill being many, and several of them out of the jurisdic-cross cause. tion, and others not to be found, a motion was made that service on their clerk in Court should be good service, which was refused. A motion of the same nature was made, in Bond v. The Nor in a sup-Duke of Newcastle (s), and Lord Thurlow, after consulting the plemental suit. registrar, said, it could not be done even in a cross cause, or upon a supplemental bill, for they are distinct suits in which the attorney or clerk in Court have no authority to appear; and the Court will not bring a party into contempt for non-appearance, when for want of privity he may know nothing of the order to appear (t).

But although the Court would not, upon cause and cross cause, Court will, order a subpæna in the cross cause to be served upon the clerk in however, suscourt of the plaintiffs in the original cause, yet it suspended the ceeding in the proceedings in the original cause till the plaintiffs had answered original cause. the cross bill (u). And where a defendant had appeared to an original bill, and afterwards the plaintiff died, and a bill of revivor was filed by his representatives against the same defendant, who was not to be found, a motion, that service upon his clerk in

(q) This in all probability was the case of Willings v. Loman, reported in Hind's Practice, 90.

(r) Anderson v. Lewis, 3 Bro. C. C. 429, 430. [See Perkins's (ed.) 430, Eden's note (6)].

(s) 3 Bro. C. C. 386; see also Rob-

erts v. Worsley, 2 Cox, 389; and Gildenechi v. Charnock, 6 Ves. 171. (t) Ibid. Ed. Belt, from Lord Col-

chester's MSS.

(u) Anderson v. Lewis, ubi. sup.; Mason v. Gardiner, 4 Bro. C. C. 478; Waterton v. Croft, 5 Sim. 502.

⁽¹⁾ Eckert v. Banert, 4 Wash. C. C. 370; Ward v. Sebring, ib. 472. VOL. I.

Substituted Service under the general Jurisdiction.

Service upon

Court in the original cause might be deemed good service, was refused by Lord Thurlow, who said that the plaintiff must proceed under the 5 Geo. II. c. 25, for taking the bill pro confesse (1).

Although it is in general true that, except in injunction cases, agent or factor, the Court will not order substituted service to be good service upon defendants who are out of the jurisdiction, yet it seems that, in cases where the party out of the jurisdiction has appointed another to act as his agent in respect of the property which is the subject-matter of the suit, and such agent has been made a party to the suit, for the purpose of serving him with an injunction to restrain his dealing with such property, the Court has permitted service of the subpana upon the agent to be considered good service upon his employer (1). This seems to have been the principle acted upon in the case of Hyde v. Forster (2), which, although it is one of those cases in Mr. Dickens' reports which are the subject of Lord Redesdale's observations in the case of Smith v. The Hibernian Mine Company, before referred to, vet, as upon reference to the registrar's book, it appears to have been correctly reported, must be considered as excepted from the disqualifying effect of those observations.

Upon agent.

In the recent case of Hobhouse v. Courtney (a), the V. C. of England had occasion to review all the cases and authorities upon this subject. The defendant, who was out of the jurisdiction, had given special authority to a person within the jurisdiction to act as his agent with respect to the property which was the subject of the suit, and the Court ordered service of the subpens to appear and answer on that person, to be good service upon the defendant. His Honor, in his judgment, distinguished the case before him from that of Smith v. The Hibernian Mine Company (b), before referred to, upon the ground that in the latter case the defendant out of the jurisdiction had given a power of attorney to a person to act for him in the management of his affairs not in the subject-matter of the suit, from whence it may be inferred that in all cases the Court must be well satisfied that the person upon whom the substituted service is sought to be effected has not

Who must have a special authority.

⁽z) Henderson v. Maggs, 3 Bro. C. C. 127.

⁽a) 19 Sim. 140. (b) 1 Sch. & Lef. 239.

⁽z) 1 Dick. 102; see 12 Sim. 154.

⁽¹⁾ Substituted service was allowed on the general agent of the defendant, resident abroad, but where, unknown; though it did not appear that he was secreted or withdrawn to avoid being served. Somers v. Cosnelly, 1 Irish Eq. 416.

Where a defendant is absent from home, and no person can be found at his place of abode, the subpana may be served on his clerk or servant, at his store or place of business. Smith v. Parke, 2 Paige, 298; Dyett v. N. A. Coal Co. 20 Wendell, 570.

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merely authority from the defendant to act generally in his affairs, but that he has a special authority having reference to the subject-matter of the suit.

Substituted
Service under
the general
Jurisdiction.

With respect to the cases of Bond v. The Duke of Newcastle and Roberts v. Worsley (c), his Honor observed, that the person upon whom the substituted service was sought to be effected, and who was the clerk in Court of the absent party, had no authority to act for him in any capacity whatever, except as his clerk in Court, and he had that authority with respect to the original suit only. He could not stand therefore in the situation of a person specially authorized to act as the agent of the absent party in the matter of the amended bill.

An application of a similar kind was recently made to Sir James Wigram, V. C., in the case of Webb v. Salmon (d), and refused by him upon the ground that the persons upon whom the substituted service was sought to be effected were not agents in the matter of the suit when the correspondence with the plaintiff's solicitor commenced, and that they refused to accept the agency, "there was not therefore that appointment of them as the solicitors or agents of the defendant, which the observations of the V. C. of England in the case of Hobhouse v. Courtney assumed to be necessary." He also observed that he was not prepared to go beyond that case.

In the case of Cooper v. Wood (g), Lord Langdale, M. R., ordered substituted service on a person who had acted as the solicitor of the absent defendant, in the subject of the mortgage to which the suit related, and who, there was reason to believe, was in communication with the defendant. And in Weymouth v. Lambert (h), the same Judge ordered substituted service of a subpanta in a creditor's suit, one who, acting as the attorney of the executor and general devisee and legatee, resident in India had obtained administration here, and had entered into receipt of the rents of the real estate.

Having now considered the original jurisdiction of the Court Service upon to order substituted service in the case of absent defendants, it is ant under stat-desirable to state the powers recently conferred by the legislature, utes and orfor the purpose of extending this jurisdiction. The statutes operate in two ways:—first, by allowing actual service under certain circumstances to be effected out of the jurisdiction; secondly, by extending the practice of ordering service within the jurisdic-

⁽g) 5 Beav. 391. (h) 3 Beav. 333.

⁽c) See last page. (d) 3 Hare, 251.

Service upon tion, upon a person other than the defendant, as a substitute for ants under Or. service upon the defendant himself.

ders and Statutes.

W. IV. c. 82,

The provisions of the statutes 2 Will. IV. c. 33, and 4 & 5 Will. IV. c. 82, apply to all suits concerning lands, tenements, or 2 Will. IV. c. hereditaments situate in England or Wales, or concerning any 33, s. 1; 4 & 5 charge, lien, judgment, or incumbrance thereon, or concerning any money vested in any government or other public stock or public shares, in public companies or concerns, or the dividends or produce thereof. And the effect of the above-mentioned Acts is,

> First, that, in such suits upon special motion, the Court may order and direct that service in any part of Great Britain (i) or Ireland, or the Isle of Man, shall be deemed good service upon the defendants, on such terms, in such manner, and at such time as to the Court shall seem reasonable.

4 & 5 Will, IV. c. 82, s. 1.

Secondly, in suits of the same description, in case the defendant or defendants shall appear by affidavit to be resident in any specified place out of the United Kingdom of Great Britain and Ireland, the Court may, upon open motion of any of the complainants in any such suit, founded upon an affidavit or affidavits, and such other documents as may be applicable for the purpose of ascertaining the residence of the party, and the particulars material to identify such party and his residence, and also specifying the means whereby such service may be authenticated, and especially where there are any British officers, civil or military, appointed by or serving under her Majesty, residing at or near such place, order that service of the subpæna upon the party, in manner thereby directed, or in case where the Court may deem fit, upon the receiver, steward, or other person receiving or remitting the rents of the lands or premises, if any, in the suit mentioned, returnable at such time as the said Court shall direct, shall be deemed good service upon such party.

4 & 5 Will. IV. c. 82, s. 2.

Thirdly (k), in any of such suits, if it shall be made to appear by affidavit that any defendant cannot by reasonable diligence be personally served with the subpæna to appear and answer, or that upon inquiry at his usual place of abode, he could not be found, so as to be served with such process, and that there is just ground for believing that such defendant secretes or withdraws himself. so as to avoid being served with the process of such Court, then and in all such cases, the Court may order that the service of the subpæna to appear and answer, shall be substituted in such manner as the Court shall think reasonable, and direct by such order.

⁽i) The Act extends to Scotland; (k) 4 & 5 Will. IV. c. 82, a. 2. Cameron v. Cameron, 2 M. & K. 289.

In the first and second of the above-mentioned cases, it is pro- Service upon vided (I) that, together with the subpæna or letter missive, served ants under Orunder any such order of the Court, a copy of the prayer of the ders and Stabill should be served upon the defendant; and it is further provided, that no process of contempt shall be entered upon any such 2 Will. IV. c. proceedings, nor any decree made absolute, without special order 33, s. 3. upon special motion, made for the purpose.

It is not necessary, in the third case, that a copy of the prayer of the bill should accompany the subpæna (m).

It should also be observed, that it is provided that the plaintiff shall not be compelled to avail himself of these statutory provisions, so that he may still proceed in the absence of the defendant, in any other manner permitted to him by the practice of the Court (n).

The provisions of these Acts have been carried out, by the Or. Under Orders ders of May, 1845, the 83rd of which provides, that "where a of 1845. defendant in any suit is out of the jurisdiction of the Court."

- 1. "The Coart upon application, supported by such evidence as shall satisfy the Court in what place or country such defendant is, or may probably be found, may order that the subpœna to appear to and answer the bill, may be served on such defendant, in such place or country, or within such limits as the Court thinks fit to direct."
- 2. "Such order is to limit a time, (depending on the place or country within which the subpæna is to be served), after the service of the subpœna, within which such defendant is to appear to the bill, and also (if an answer be required) a time within which such defendant is to plead, answer, or demur, or obtain from the Court further time to make a defence to the bill."
- 3 "At the time when such subpana shall be served, the plaintiff is also to cause such defendant to be served with a copy of the bill, and a copy of the order giving the plaintiff leave to serve the subpæna."
- 4. "And if, upon the expiration of the time for appearing, it appears to the satisfaction of the Court that such defendant was duly served with the subpæna, and with a copy of the bill, and a copy of the order, the Court may, upon the application of the plaintiff, order an appearance to be entered for such defendant."

And by the 23rd of these Orders, it is provided, that "Subpænas to appear, or to appear and answer, which are served out of the jurisdiction of the Court, are to be made returnable at such

⁽l) 2 Will. IV. c. 33, s. 3. (m) 2 Will. IV. c. 33, s. 3.

⁽n) Ibid.

June 1 such

time after the service there. I as the Court by special Order may fired, and i in mewer be required, each such subpara is to specify the time after service within which the defendant is required to answer.

The Orders of May, 1845, provide, that when the subpana to appear and answer is, by leave of the Court, to be served on a defendant or defendants out of the jurisdiction, it should be in the talowing form, slightly differing from the ordinary form before stated (4) (1).

- " Victoria, &c.
- " To, &c.

"We command you (and every of you, where more than one defendant) that within (insert the time directed by the Order, giving leave to serve the writ out of the jurisdiction), after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our High Court of Chancery, to a bill (or as the case may be, &c.) filed against you by (and others, or another), and that within (insert the time directed by the same Order,) you do put in your answer to the same bill (or as the case may be, &c.), and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of such process as our said Court shall award.

* Witness, &cc."

" DEVON."

The contract memorandum is to be placed at the foot):—

"Here we contract Lane, London; and if you do not cause your access are to be entered at the Record and Writ Clerks'

"Here we contract Lane, London; and if you do not cause your access as he entered within the time limited by the above for you are sent if you do not plead, answer, or demur to be at liberty to enter an appearance for you will be above writ, you will be above writ, you will be time limited by the above writ, you will be above the court shall award, and to such the court shall award, and to such the court shall award, and to such the court shall think the court shall think the court shall think the court shall think the court shall award, and is by leave of the

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Court to be served on a defendant out of the jurisdiction, it must Service upon absent Defend. be in the following form :-

ants under Orders and Statutes.

- " Victoria, &c.
- " To, &c.

"We command you (and every of you, where more than one de- Form of subparfendant) that within (insert the time directed by the order giving na to appear leave to serve the writ out of the jurisdiction), after the service fendant out of of this writ on you, exclusive of the day of such service, laying all jurisdiction. other matters and excuses aside, you do cause an appearance to be entered for you in our High Court of Chancery to a bill (or as the case may be, &c.) filed against you by others or another,) and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of such process as our said Court shall award.

" Witness, &c."

"DEVON."

(The following memorandum to be placed at the foot):-

"Appearances are to be entered at the Record and Writ Clerks" Office in Chancery Lane, London, and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you at your expense, and you will be subject to such process as the Court shall award, and to such order or decree being made against you as the Court shall think just, upon the plaintiff's own showing."

It may be observed here, that the Acts of Parliament before referred to, conferring upon the Court of Chancery the power of serving process out of the jurisdiction, apply to suits of a particular kind, and further, that they fetter the exercise of the privilege by certain restrictions. Whereas the Orders of 1845 apply to suits of all descriptions, and in some respects dispense with the provisions which the legislature had required. By the 3 & 4 Vict. c. 94, and the 5th Vict. c. 5, s. 29, the Lord Chancellor, with the advice and consent of the Master of the Rolls and the Vice-Chancellors, or any two of them, is empowered to make alterations in forms and in the mode of proceeding, but the words of the Act scarcely seem to extend to an alteration in the power of the Court to issue process out of the jurisdiction. It is presumed, however, that in whatever respect the orders extend or vary in the practice of the Court in issuing process without the jurisdiction, they must derive their validity either from the stat. 3 & 4 Vict. c. 94, or

tutes.

Form of subpæna on defendant out of jurisdiction.

Service upon time after the service thereof, as the Court by special Order may absent Defendants under Or. direct; and if an answer be required, each such subpæna is to ders and Sta- specify the time after service within which the defendant is required to answer."

> The Orders of May, 1845, provide, that when the subpæna to appear and answer is, by leave of the Court, to be served on a defendant or defendants out of the jurisdiction, it should be in the following form, slightly differing from the ordinary form before stated (o) (1).

- " Victoria, &c.
- " To, &c.

"We command you (and every of you, where more than one defendant) that within (insert the time directed by the Order, giving leave to serve the writ out of the jurisdiction), after the service of this writ on you, exclusive of the day of such service, laying all other matters and excuses aside, you do cause an appearance to be entered for you in our High Court of Chancery, to a bill (or as the case may be, &c.) filed against you by (and others, or another), and that within (insert the time directed by the same Order,) you do put in your answer to the same bill (or as the case may be, &c.), and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of such process as our said Court shall award.

"Witness, &c."

" DEVON."

(The following memorandum is to be placed at the foot):-

"Appearances are to be entered at the Record and Writ Clerks' Office, in Chancery Lane, London; and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you at your expense; and if you do not plead, answer, or demur to the bill, &c., within the time limited by the above writ, you will be subject to such process as the Court shall award, and to such order or decree being made against you, as the Court shall think just upon the plaintiff's own showing."

When the subpæna is to appear only, and is by leave of the

(o) See page 496.

⁽¹⁾ Service of a subpana abroad ought to be personal. Lloyd s. Lord Trimbleston 1 Moll. 244; Irwin v. Carleton, ib. 245.

Court to be served on a defendant out of the jurisdiction, it must Service upon be in the following form :-

absent Defendants under Orders and Statutes.

" Victoria, &c.

" To, &c.

"We command you (and every of you, where more than one de- Form of subpafendant) that within (insert the time directed by the order giving na to appear leave to serve the writ out of the jurisdiction), after the service fendant out of of this writ on you, exclusive of the day of such service, laying all jurisdiction. other matters and excuses aside, you do cause an appearance to be entered for you in our High Court of Chancery to a bill (or as the case may be, &c.) filed against you by others or another,) and that you do answer concerning such things as shall then and there be alleged against you, and observe what our said Court shall direct in this behalf, upon pain of such process as our said Court shall award.

"Witness, &c."

" DEVON."

(The following memorandum to be placed at the foot):-

"Appearances are to be entered at the Record and Writ Clerks' Office in Chancery Lane, London, and if you do not cause your appearance to be entered within the time limited by the above writ, the plaintiff will be at liberty to enter an appearance for you at your expense, and you will be subject to such process as the Court shall award, and to such order or decree being made against you as the Court shall think just, upon the plaintiff's own showing."

It may be observed here, that the Acts of Parliament before referred to, conferring upon the Court of Chancery the power of serving process out of the jurisdiction, apply to suits of a particular kind, and further, that they fetter the exercise of the privilege by certain restrictions. Whereas the Orders of 1845 apply to suits of all descriptions, and in some respects dispense with the provisions which the legislature had required. By the 3 & 4 Vict. c. 94, and the 5th Vict. c. 5, s. 29, the Lord Chancellor, with the advice and consent of the Master of the Rolls and the Vice-Chancellors, or any two of them, is empowered to make alterations in forms and in the mode of proceeding, but the words of the Act scarcely seem to extend to an alteration in the power of the Court to issue process out of the jurisdiction. It is presumed, however, that in whatever respect the orders extend or vary in the practice of the Court in issuing process without the jurisdiction, they must derive their validity either from the stat. 3 & 4 Vict. c. 94, or

Extraordinary
Service upon
Defendants
within the Jurisdiction.

from the inherent power which the Court of Chancery possesses independent of Statute Law.

In cases where the defendant is not actually out of the jurisdiction, but where ordinary service cannot be effected, there are various means in which the Court, in the exercise of its discretion, has by special order permitted different modes of service to be adopted; thus service at the last place of abode of the defendant's wife has been ordered to be good service (o). So service by sending the subpæra under cover to the person to whom the defendant had directed his letters to be sent has been permitted (p). Again in the case of infants, substituted service upon the mother in one case (q), and upon the father-in-law in another (r), was ordered to be good service; and when an infant has been taken out of the jurisdiction for the express purpose of preventing his being served personally, Lord Langdale, M. R., ordered that service upon the solicitor and Six Clerk of the patent should be good as against the infant (s) (1).

Upon infants.

Mode of serving notice of such proceedings as do not require personal service. It may here be observed, that what has hitherto been stated relates exclusively to the service of the subpæna; the same rule, however, seems to apply to the service of all other writs, upon which process of contempt may afterwards be issued, and which require, therefore, what is called personal service. The same strictness is not, however, necessary for the service of notice of ordinary proceedings in the cause. Service in such cases used to be made upon the clerk in Court of the party intended to be affected with the notice; but ever since the abolition of the Six Clerks' Office, the Order of October, 1842, point out the manner in which service of these proceedings is hereafter to be made.

We have seen that a solicitor must state his name and place of business and address for service, on all pleadings and proceedings (t). By the 18th of the Orders of Oct. 1842, a party suing or defending by a solicitor, is not at liberty to change his solicitor in any cause or matter, without an order of the Court for that purpose, which may be obtained by motion or petition as of course; and until such order is obtained and served, and notice thereof

⁽o) Sir W. Pulteney v. Shelton, 5 (s) Lane v. Hardwicke, 5 Beav. Ves. 147.

⁽p) Hurd v. Lever, 5 Ves. 147. (q) Baker v. Holmes, 1 Dick. 18.

⁽q) Baser v. Holmes, 1 Dick. 18. (r) Thompson v. Jones, 8 Ves. 141.

⁽t) 17th Order, Oct. 1842, and page

⁽¹⁾ See Kirwan v. Kirwan, 1 Hogan, 264, cited ante, 500.

given to the Clerk of Records and Writs, the former solicitor Serving notice shall be considered the solicitor of the party.

in the Cause.

By the 19th Order, where the party sues or defends by a solicitor, and no address for service of such solicitor shall have been indorsed or added, pursuant to the directions of the 17th Order, all writs, notices, orders, warrants, rules and documents, proceedings, and written communications, not requiring personal service upon the party to be affected thereby, and which have heretofore been served upon the sworn clerks or waiting clerks, shall, unless the Court shall otherwise direct, be deemed sufficiently served upon the party, if served upon his solicitor, at his place of business; but if an address for service of such solicitor shall have been endorsed or added as aforesaid, then all such writs, notices, orders, warrants, rules and other documents, proceedings and written communications, shall be deemed sufficiently served upon such party, if left for his solicitor, at such address for service.

The 20th Order directs that every party suing or defending in Parties suing person, shall cause to be endorsed or written upon every writ in person. which he shall sue out; and upon every information, bill, demurrer, plea, answer, or other pleading or proceeding, and all exceptions which he may leave with the Clerks of Records and Writs, to be filed; and upon all instructions which he may give to the Clerks of Records and Writs, for any appearance or other purpose, his name and place of residence, and also (if his place of residence shall be more than three miles from the Record and Writ Clerks' Office) another proper place (to be called his address for service), which shall not be more than three miles from the said Office, where writs, notices, orders, warrants, rules and other documents, proceedings and written communications may be left for him.

By the 21st Order, where the party sues or defends in person, How served and no address for service of such party shall have been indorsed with notice. or written, pursuant to the directions of the 20th Order; and in cases where any party has ceased to have a solicitor, all writs. notices, orders, warrants, rules and other documents, proceedings and written communications, not requiring personal service upon the party to be affected thereby, and which have heretofore been served upon the sworn clerks or waiting clerks, shall, unless the Court shall otherwise direct, be deemed to be sufficiently served upon the party, if served upon him personally or at his place of residence; but if an address for service of such party shall have been endorsed or added as aforesaid, then all such writs, notices,

in the Cause.

Serving notice orders, warrants, rules and other documents, proceedings and of Proceedings written communications, shall be deemed sufficiently served upon such party, if left for him at such address for service.

By the 22nd Order all writs, notices, orders, warrants, rules and other documents, proceedings and other written communications, not requiring personal service upon the party to be affected thereby, and which have heretofore been served upon the clerks in court or waiting clerks, shall be served before eight o'clock in the evening of the day on which the same shall be served, or otherwise the same shall be deemed to have been served on the next following day, excluding Sundays.

Persons not parties to the cause, how served with notice

And with respect to persons not parties to the cause, the 44th Order of 1828 provides, "That whenever a person who is not a party, appears in any proceeding, either before the Court, or before the Master, service upon the solicitor in London, by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service."

### SECTION III.

Proceeding where no Service of a Subpuma can be Effected.

In the event of the plaintiff not being able by any of the means

previously mentioned, to effect a due service of the subpens upon the defendant, the legislature has provided for him another line of proceeding, which in some cases he may adopt, to bring his cause to a state in which a decree may be obtained; this is, by having the bill taken pro confesso, without either appearance by, or service of the subpæna upon, the defendant. In order that the plaintiff may pursue this course, he must be able to satisfy the Court by affidavit, "that the defendant is beyond the seas, or that upon inquiry at his usual place of abode, he could not be found so as to be served with process; and that there is just ground to believe that he is gone out of the realm, or otherwise absconded, to avoid being served with the process of the Court." And if the affidavit shows the defendant to be beyond the seas, the plaintiff must also prove by affidavit, "that the defendant has been in England within the two years next before the subpana issued."

1 Will. IV. c. 36, sec. 3.

1 Will. IV. c. 36, sec. 9.

> Upon motion supported by such affidavits, the Court may make an order, directing and appointing such defendant to appear at a

certain day therein to be named; and a copy of such order shall, Serving notice within fourteen days after such order made, be inserted in the in the Cause. "London Gazette," and published on some Lord's Day, immediately after divine service, in the parish church of the parish where such defendant made his usual abode within thirty days next before such his absenting; and also a copy of such order shall, within the time aforesaid, be posted up at the Royal Exchange, in London; and if the defendant do not appear within the time limited by such order, or within such further time as the Court shall appoint, then on proof made of such publication of such order as aforesaid, the Court being satisfied of the truth thereof, may order the plaintiff's bill to be taken pro confesso (1).

against them by publication, as in the case of adults. Walker v. Hallett, 1 Ala. (N. S.) 379; Dunning v. Stanton, 9 Porter, 513.

In New York, where there is an infant absentee, the course under the statute must be pursued; and on the expiration of the time fixed for his appearance, if no one applies in his behalf, the plaintiff may move, as in ordinary cases, for a guardian ad litem Ontario Bank v. Strong, 2 Paige, 301.

Proceedings may also be had under the statute by publication, where the infant is concealed. Mortimer v. Gopsey, 1 Hoff. Ch. Pr. 194.

And the Court has directed the same course to be pursued where the defendant was a resident of another State, and a lunatic. Otis v. Wells, 1 Hoff. Ch. Pr. 194.

The statutes authorizing proceedings against absent defendants and unknown heirs, upon constructive notice by publication, must be strictly pursued. Brown v. Wood, 6 J. J. Marsh. 11, 14.

Where the statute directs an order of publication to be certified by the printer in whose paper the order has been published, a certificate must be made by the printer or proprietor, and not by a mere editor. Brown v. Wood, 6 J. J. Marsh. 11, 19; Butler v. Cooper, 6 J. J. Marsh. 29, 30. See Swift v. Stebbins, 4 Stew. & Port. 84.

Where an order of publication has not been returned, an entry on the record that it was proved to have been duly executed, is insufficient evidence of publication to authorize the rendition of a decree. Green v. M'Kinney, 6 J. J. Marsh. 193, 197. But see contra, Swift v. Stebbins, 4 Stew. & Port.

447.

It is not sufficient that an order of publication is had in a Chancery cause; proof of the publication must also be made. Moore v. Wright, 4 Stew. & Porter, 84.

The proceeding by publication on the ground that the defendant does not reside in the State, does not apply to those, such as mariners, who are temporarily absent in their vocation. M'Kin v. Odom, 3 Bland, 407.

In New Jersey, where any of the defendants reside in the State, and are served with process, it is not necessary, unless under special circumstances, that the order for the appearance of absent defendants should be published in any newspaper out of the State. Foreign publication is required only where all of the defendants reside out of the State. Wetmore v. Dyer, 1 Green Ch. 386.

⁽¹⁾ There are undoubtedly provisions in the several States, for notifying non-resident defendants, and taking bills as confessed against them upon their non-appearance. For Massachusetts, see Bule 8th of the Rules for Reg. of Prac. in Chancery. New York, 1 Barbour, Ch. Pr. 92-96; Jermain v. Langdon, 8 Paige, 41; Evarts v. Becker, ib. 506; Corning v. Baxter, 6 ib. 178. Connecticut, Central Manuf. Co. v. Hartshorne, 3 Conn. 199.

Non-resident infant defendants must be notified of the pendency of a suit against them by publication, as in the case of adults. Walker v. Hallett, 1 Als. (N. 8.) 379; Dunning a Stanton Q Potter 513.

Serving notice Under Orders of May, 1544.

The 31st Order, of May 1845, applies to the same circumstances of Proceedings as the provisions of the Act last stated; the affidavits which the order requires are very nearly the same as those necessary under the Act; but the order only enables the plaintiff to obtain an appearance to be entered for the defendant, and does not, like the Act, authorize the bill to be taken pro confesso at once. The order, however, dispenses with the necessity of having the notice posted up at the Royal Exchange, and of its publication in the parish church; it is in the following terms:—

31st Order, defendant absconding.

"In case it appears to the Court, by sufficient evidence, that any defendant against whom a subpassa to appear to, or to appear to and answer a bill, has issued, has been within the jurisdiction of the Court, at some time, not more than two years before the subpana was issued, and that such defendant is beyond the seas, or that upon inquiry at his usual place of abode, (if he had any,) or at any other place or places, where at the time when the subpæna was issued, he might probably have been met with, he could not be found, so as to be served with process; and that in either case, there is just ground to believe that such defendant is gone out of the realm, or otherwise absconded to avoid being served with process, then, and in such case, the Court may order that such defendant do appear at a certain day, to be named in the order; and a copy of such order, together with a notice thereof, to the effect set forth at the foot of this order, may within fourteen

A decree against non-resident defendants upon whom process has not been served, or proof of publication made, is erroneous. Gale v. Clark, 4 Bibb, 415. But a decree regularly made against absent defendants, will not be set aside of course, on their coming in and answering, not unless the justice of the case requires it. Dunlap v. M'Elvoy, 3 Litt. 269.

In New York, where a defendant is proceeded against as an absentee, he is entitled of course without an affidavit of merits, at any time before a sale

under the decree, to come in and make his defence, if he has any, upon payment of such costs as the Court may deem reasonable. Jermain v. Langdon, 8 Paige, 41; Evarts v. Beeker, 8 Paige, 506.

In such case it is not necessary to vacate the decree in the first instance; the decree may be permitted to stand until the validity of the defendant's defence is ascertained, and proceedings for this purpose may be had in the same manner as if the decree had been opened or vacated. Jermain s.

Langdon, ubi supra.

Where a defendant, who has a fixed and notorious domicil within the State, is proceeded against as an absentee, it is irregular, and if he applies the first opportunity after he has notice of the proceedings against him and before a sale under the decree, he will be let in to defend of course, and without costs. Jermain v. Langdon, 8 Paige, 41; Evarts v. Beeker, ib. 506.

In order to obtain a decree against a non-resident defendant, who does not appear, and who has not been personally served with process, the report of a Master as to the truth of the allegations contained in the bill is necessary. Corning v. Baxter, 6 Paige, 178. And the reference to a Master as to the rights of an absentee, must be had, although there are other defendants who join and contest the claim of the plaintiff. days after such order made, be inserted in the 'London Gazette,' Defendant Aband be otherwise published as the Court directs; and in case the defendant does not appear within the time limited by such order, or within such further time as the Court appoints; then on proof made of such publication as aforesaid, of the aforesaid order, the Court may order an appearance to be entered for the defendant, on the application of the plaintiff."

Notice. — "A. B., take notice that if you do not appear pursuant to the above order, the plaintiff may enter an appearance for you, and the Court may afterwards grant to the plaintiff such relief as he may appear to be entitled to on his own showing."

#### SECTION IV.

# Of compelling Appearance when Service of the Subpæna has been Effected.

HAVING now considered the various means of effecting due service of the subpæna, and also the means which are afforded to the Entering applaintiff in certain cases of proceeding with his cause where ser-pearance for vice is impossible, the next subject for investigation is in what manner, after the subpæna has been duly served, the plaintiff can obtain an appearance to be entered in the event of the defendant himself not appearing in the time limited by the terms of the writ. By the 16th Order of May, 1845, Art. 3, if a defendant be served with the subpæna to appear to, or to appear to and answer a bill, he is to appear thereto within eight days after the service of such subpæna.

If he does not, he becomes subject to the following liabilities:

- 1. An attachment may be issued against him.
- 2. An appearance may be entered for him on the application of the plaintiff.
- 3. If the bill prays for an injunction to stay proceedings at Law, the plaintiff may obtain an order for the common injunction, if no injunction has been previously obtained.

It appears therefore that if a defendant do not appear within eight days after service, he has incurred a contempt and may be attached, but the Court has afforded a simple remedy to the plaintiff; for by the 29th of these Orders. "If any defendant, not appearing to be an infant or a person of unsound mind, unable of himself to defend the suit, is, when within the jurisdiction of the Court, duly served with a subpæna to appear to, or to answer a

pearance for Defendant.

Entering Ap- bill, and refuses or neglects to appear thereto within eight days after such service, the plaintiff may, after the expiration of such eight days, and within three weeks from the time of such service, apply to the Record and Writ Clerk to enter an appearance for such defendant; and no appearance having been entered, the Record and Writ Clerk is to enter such appearance accordingly, upon being satisfied, by affidavit, that the subpæna was duly served upon such defendant personally, or at his dwelling-house or usual place of abode; and after the expiration of such three weeks, or after the time allowed to such defendant for appearing has expired, in any case in which the Record and Writ Clerk is not hereby required to enter such appearance, the plaintiff may apply to the Court for leave to enter such appearance for such defendant; and the Court being satisfied that the subpæna was duly served, and that no appearance has been entered for such defendant, may, if it so thinks fit, order the same accordingly (1)."

Without application to the Court.

Under this order the plaintiff can within three weeks after service enter an appearance without application to the Court. Before, it was necessary in all cases to apply to the Court specially for leave for that purpose, and if there had been a long interval between the time of the service of the subpæna and the date of the motion, the Court would not allow the appearance to be entered without either having some explanation of the cause of the delay, or providing that notice was given to the defendant before the entry of the appearance (y). Probably hereafter when a plaintiff by allowing the period of three weeks after service to expire without obtaining an appearance to be entered by the Clerk of Records and Writs, shall be compelled to apply to the Court, a similar practice will be adopted. Proof was in some cases demanded that the subpæna contained the memorandum required by the orders (z), which gives notice to the defendant of his liability to have an appearance entered for him; the new order does not seem to require such proof, and it may probably be considered unnecessary when the present form of the subpæna has become established.

If however the plaintiff does not choose himself to enter an appearance for the defendant, he is at liberty to proceed to compel him by attachment to appear (2). For this purpose the solicitor

(y) Radford v. Roberts, 2 Hare, 96; Morgan v. Morgan, 1 Col. 228. (z) Tatham v. Williams, 1 Hare, 509; Beetham v. Berry, 5 Beav. 41.

⁽¹⁾ Walker v. Hurst, 13 Sim. 490; Marquis of Hertford v. Suisse, 13

⁽²⁾ Mussina v. Bartlett, 8 Porter, 277.

The general mode of compelling obedience to the orders of the Court, is by attachment. Matter of O'Reillys, 2 Hogan, 20.

of the plaintiff must prepare a writ of attachment, which is in the following form:

By Attachment.

Form of writ of attachment.

" Victoria, &c.

" To the sheriff of Greeting. We command you to attach A. B., so as to have him before us in our Court of Chancery, , wheresoever the said Court shall then be, there to answer to us, as well touching a contempt which he, as it is alleged, has committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf; and hereof fail not, and bring this writ with you.

"Witness ourself at Westminster, the day of in the year of our reign."

To the bottom of this writ, on the right hand side, must be put the surname of the Master of the Rolls.

By the standing order of the Court, all process of contempt Must be into must be made out into the proper county where the party against the proper whom the same issues is resident or dwelling, unless he shall be county. then in or about London, in which case it may be directed into the county where he shall then be (b).

It seems, however, that in ordinary cases a plaintiff may at the same time sue out two or more attachments against the same defendant into different counties, but only one of them must be executed, otherwise the party would be liable to an action; and where a defendant being in contempt, the attorney sued an attachment into Kent and another into London, and arrested the defendant upon each, upon this being shown to the Court, costs were order- Into what ed to be taxed by the Master, for irregularity and vexation; but sued. in regard that the plaintiff was poor, the Court, upon his prayer, ordered the costs to be paid by the defendant out of a sum of 600%. decreed to the plaintiff and resting in Court, and the defendant was set at liberty without entering his appearance with the Re-

(a) Here must be inserted the day of the return, which may be "immediately after the receipt of this writ," or on one of the old general return days in Term; as, "on the morrow of All Souls, next ensuing," or on the day of next ensuing," being some day in vacation, according to the circumstances stated in the next page.

(b) Beames, Ord. 199.

It always rests in the sound discretion of the Court, whether the rule for an attachment shall be absolute, or nisi, though the latter is the usual and safer course. Matter of Vanderbilt, 4 John. Ch. 58.

By Attachment. gistrar, for the Court said none should take advantage of his own wrong (c).

How directed.

If the defendant resides in the county palatine of Lancaster, the attachment must be directed to the Chancellor of the Duchy, or his deputy, commanding him to issue his mandate to the sheriff, to attach the party; and to enforce obedience, it is necessary to obtain an order, which is of course upon the Chancellor, to return the writ, and afterwards an order upon the sheriff to return the mandate (d).

Where the defendant is in a city or town which is a county in itself, the writ must be directed to the sheriff of such city or town. If the defendant resides within the Cinque Ports, the attachment is directed to the Lord Warden thereof accordingly (e).

The names of three defendants, but not more, may be inserted in one writ.

The writ must be endorsed, "For not appearing at the suit of , complainant;" and must be further endorsed with the name and address of the solicitor (f).

Of the return of the writ.

According to the old practice of the Court, this writ, as well as all other process of contempt, must have been returnable in Term time (g); and it was also requisite, where it was intended to proceed to a sequestration, or to take a bill pro confesso, that there should be fifteen days between the teste (or date) and the return of the writ, unless the defendant lived within ten miles of London, when an order might be obtained, by motion or petition of course, to make the several processes returnable immediately (h). der, however, to save the expense of the order for a writ returnable immediately, in a town cause, and also to get rid of the delay in the process occasioned by that proceeding, a clause has been introduced into the 1 Will. IV. c. 36, s. 15, rule 3, by which it is provided, "that the party prosecuting any contempt shall be at liberty, without order to sue forth the several writs in process of contempt returnable immediately, in case the party in contempt resides or is in London, or within twenty miles thereof, and that in other cases the party prosecuting a contempt shall be at liberty. without order, to sue forth such several writs returnable in vacation, provided that there be fifteen days between the teste and the return of each writ."

When return-

May be in vacation;

The effect of this Act is, to extend the power of issuing attach-

⁽c) Prac. Reg. 48. (d) 1 Turn. & V. 118. (e) 1 Harr 199 Treation of Treat

⁽c) 1 Harr. 122. Trotter v. Trotter, Jac. 533.

⁽f) See page 496. (g) Hind. 101. (h) Hind. 101.

ments and other process returnable in vacation to all cases, with the restriction, that where the party resides above twenty miles from London, there shall be fifteen days between the teste and the Where party return, and to permit such process to be issued without a previous resides more than twenty order to that effect.

By Attach-

miles from

It is to be observed, that where an attachment is issued not London. returnable immediately, but of which the return must take place Where returnable in Term in Term time, it must still, as before, be made returnable on a time must be general return day; thus when the last of the fifteen days requir- on a return ed by the above rule of the 1 Will. IV. c. 36, falls in Term time, the attachment must be made returnable on one of the general return days of the Term occurring after the expiration of the fifteen days.

An attachment cannot have a longer return than the last return Cannot have a of the Term following that in which it is tested; if made return-longer return able immediately, it is only in force until such last return of the return of the following Term; and if executed afterwards, its execution is lia-following Term. ble to be discharged for irregularity.

When the writ has been so prepared, an affidavit of the due ser- How sealed, vice of the subpœna upon the defendant must be made and filed (i); and upon the production of the office copy of such affidavit. if it appears to the Clerk of Records and Writs that the time for the appearance of the defendant has expired, and that no appearance has been entered for him, the writ of attachment will be sealed (k). When the writ has been sealed, it must be entered in the Registrar's Office, previously to its being executed (1).

After the entry, it may be placed in the hands of the under-sher- and issued. iff of the district to which it issues, for the purpose of being exe-

If the writ is returnable immediately, the return may be called When return for on the fifth day after the writ was delivered to the under-sher- may be called iff (m). In other cases, the return may be called for, on or after the day mentioned in the writ. In either case, the order for the sheriff to return the attachment is of course.

The manner in which both original and amended bills are now filed, has before been stated (n); and it would appear, from the

(i) Bromhead v. Smith, 8 Ves. 357. (k) 4th Order of October, 1842. A præcipe, in the following form, should be left with the Clerk of Records and Writs:

A. B. Seal an attachment directed v. to the sheriff of , age C. D. C. D. for not appearing. , against ; returnable Ats. A. B. Plaintiff

immediately. Entered day of (Name and address of plaintiff's solicitor.)

(l) Smith v. Thompson, 4 Madd. 179.

(m) Makepeace v. Dillon, Imp. Off. Sheriff, 363. (n) See page, 546.

By Attachment. old cases, that, under no circumstances, can an attachment be issued for appearance or answer, unless the bill be regularly filed (0).

Of suing out attachments in forma pauperis.

According to the old Orders of the Court, no process of contempt could have been made and sent to the great seal at the suit of any person prosecuting in *forma pauperis* until it had been signed by the Six Clerk who acted for him; but this is now altogether disused (p); when, however, process is sued out by a pauper, the order for admission in *forma pauperis* ought to be produced in the office (q).

When considered to be issued.

An attachment used to be considered as issued when it was delivered out by the sealer to the clerk in Court; and therefore where an attachment had been sealed and delivered out to the clerk in Court before the affidavit, upon which it was issued, had been filed, it was held to be irregular, although it was not parted with by the clerk in Court till after the affidavit had been placed upon the file (r). It is presumed now that the delivery to the solicitor has a similar effect.

How executed.

By the standing Orders of the Court, "Every suitor who prosecuteth a contempt ought to do his best endeavor to procure each several process to be served and executed upon the party prosecuted; and upon his wilful default therein appearing to the Court, such person offending shall pay unto the party grieved good costs, and lose the benefit of the process returned without such endeavor (s)."

Where it is intended to proceed under 1 W. IV. c. 36, s. 15.

It is particularly necessary that this rule should be attended to in cases where it is intended to proceed to take a bill pro confesse against a defendant in contempt for want of an answer; for by the Orders of May, 1845, it is necessary that the plaintiff should have exerted due diligence to procure the execution of the writ of attachment, in order that he may proceed under these orders against the defendant as having absconded (t). And if the plaintiff does not proceed under the last-mentioned orders, but under the previous practice, then for the purpose of obtaining the writ of sequestration immediately upon the return by the sheriff of non est inventus, an affidavit must be made, that "due diligence was used to ascertain where such defendant was at the time of issuing the writ, and in endeavoring to apprehend him under the same, and

⁽o) Leman v. Newnham, 1 Ves. 55, 53; Belt, Sup. 42; Adamson v. Blackstock, 1 S. & S. 118; Prac. Reg. 47.

⁽p) Beam. Ord. 217.

⁽q) 1 Harr. 330, ante, 57. (r) Gardner v. Rowe, 4 Russ. 578.

⁽s) Beam. Ord. 66, 199. (t) 77th Order, May, 1845, p. 545.

that the person suing forth such writ, verily believed, at the time of suing forth the same, that such defendant was in the county into which such writ was issued (u)."

By Attachment.

The first thing to be done after the writ has been issued, is to Delivery to the deliver it to the sheriff or other officer to whom it is directed; and sheriff; it is to be observed, that although it is directed to the sheriff, it may be delivered to the under-sheriff, by whom all the duties of the sheriff which do not require his personal presence are usually or under-sherexecuted (v). The sheriff or other officer to whom any writ is iff. directed or delivered ought with all speed and secrecy to execute Duty of Shersuch writ (x), and neither he nor his officers can dispute the au-iff, &c. thority of the Court out of which it issues, but he or his officers are at their peril to execute the same according to the command of such writ (v).

If the defendant is already in the custody of the sheriff, either Execution upon a criminal sentence or civil process, no further arrest is ne- where defencessary, but the sheriff must give notice of the attachment to the dant is already in custody. gaoler in whose custody the defendant is; and it is to be observed Defendant in that a defendant in custody upon civil process against whom an custody for attachment has been issued out of Chancery for a contempt, in not contempt cannot be disappearing or answering, cannot be discharged under an Insolvent charged under Act without an order of the Court of Chancery, and if under such without order. circumstances the sheriff takes upon himself to discharge him he will be liable to commitment (z).

Although all writs and processes are directed to the sheriffs of Execution the different counties, yet they never execute the same themselves, when defendant not in but the under-sheriffs usually make their warrants to their bailiffs custody. or officers for the execution of such writs (a); and it is the duty Warrant to of such bailiffs or other officers to execute such warrants accord- sheriffs' offiing to their directions.

These warrants must be made according to the nature of the Form of warwrit, and contain the substance thereof, and be made out in the high rant. sheriff's name, and under the seal of office (c).

By the 6th of Geo. I., no high-sheriff, under-sheriff, their deputies or agents, shall make out any warrant before they have in their custody the writs upon which such warrants ought to issue. on forfeiture of 10%. And every warrant to be made out upon any writ out of the Queen's Bench, Common Pleas, or Exchequer, before judgment, to arrest any person, shall have the same day and

⁽u) 9th Order, August, 1841.

⁽v) Impey, Off. Sheriff, 14. (z) Ibid. 45.

⁽v) Ibid. 33.

⁽z) Kendal v. Baron, cited 2 Dick.

⁽a) Impey, Off. Sheriff, 59.

⁽c) Impey, Off. Sheriff, 59.

Вy Attachment. year set down thereon, as shall be set down on the writ itself, under forfeiture of 10l. to be paid by the person who shall fill up or deliver out such warrant.

How subscribed or indorsed.

By 2 Geo. II. every warrant that shall be made out on any writ, process, or execution, shall, before the service or execution thereof, be subscribed or indorsed with the name of the same attorney, clerk in Court, or solicitor, by whom such process, &c. shall be sued But the not subscribing or indorsing the name on any warrant made on any writ, &c. shall not vitiate the same; but such writ shall be valid and effectual, provided the writ whereon such warrant is made out be regularly subscribed or indorsed; and every sheriff or other officer who shall make out any warrant upon any writ, process or execution, and shall not subscribe or indorse the name of the attorney, clerk in Court, or solicitor, who sued out the same, shall forfeit 51., to be assessed as a fine by the Court out of which such writs, &c. shall issue; one moiety to his Majesty, and the other to the person aggrieved (d).

Must be had before the arrest.

The warrant must be had before the arrest, or the arrest will be illegal, and the party grieved may have his action for false imprisonment, and the Court will direct the bail-bond to be cancelled (e).

If the writ be sued out of the Court of Chancery, then the warrant must be.

"So that I may have his body before the Queen, in her Court of Chancery."

Execution of the warrant;

may be by bailiff out of his hundred. But not out of the county.

The bailiff or officer to whom the warrant is directed and delivered ought, with all speed and secrecy, to execute the same according as it commands him, and he is bound to pursue the effect of his warrant (f); and it is to be observed, that the bailiff of a hundred may execute a writ out of the hundred where he is bailiff, for he is bailiff all the county over (g). It must, however, be within the county, for the sheriff's bailiwick extends no further (A). It seems that an arrest may be by the authority of the bailiff, though his be not the hand that arrests, nor in sight, nor within any precise distance of the defendant; it is sufficient that he is arrested (i).

An arrest on a Sunday is absolutely void (k). If, however, a defendant arrested on a Saturday escapes he may be retaken on a

⁽d) See 12 Geo. II. c. 12, s. 4. (e) 4 Bac. Abr. 452; Hall v. Roche, 8 T. R. 187.

⁽f) Imp. Off. Sheriff, 45.

⁽h) Hammond v. Taylor, 3 B. & Ald. 408.

⁽i) Blatch v. Archer, Cowp. 65.(k) 29 Car. 2.

Sunday, for that is not in execution of the process, but a continu- Execution of ance of the former imprisonment (1); and it is said that a person may be arrested on a Sunday on the Lord Chancellor's warrant, Arrest on a or an order of commitment for contempt, for he is considered as Sunday void; or an order of commitment for contempt, for he is considered as unless upon in custody from the time of making the order, and the warrant is escape; directed to the gaoler as in the nature of an escape warrant (m), or Lord Chan-(which is a warrant authorized under the 1 Ann. stat. 2, c. 6, s. cellor's com-1, and 5 Ann. c. 9, s. 3, by which the judge of any Court out of Escape warwhich process has issued, by virtue of which a party has been rant. committed to prison and escapes from such prison, may issue a warrant for his re-apprehension), under which it has been held that a defendant may be retaken on the Lord's-day (n). It is to be observed, that the sheriff is not entitled to his fees from a party whom he has improperly arrested (o).

The bailiff or other person to whom the execution of the pro-Return of warcess has been entrusted, must, as soon as he has executed the war- rant by bailiff. rant, return it, together with his answer to the same, to the sheriff, so that he may be ready to certify to the Court how and in what manner the warrant has been executed when called upon (p).

No arrest can take place under an attachment after the day of the No arrest after return of the writ (q); and if the return is allowed to expire hefore any thing is done upon the write, the plaintiff must sue out another attachment, but will in such case be allowed in costs but for one attachment (r) (1). This, however, must be understood as applying only to cases where the first writ has not been delivered to the sheriff, for after delivery to the sheriff the duty of executing it lies upon him, and he must make his return to the Court accordingly.

A sheriff or other officer employed to make an arrest under an Doors cannot attachment cannot justify breaking doors in executing the pro- be broken cess (2); and it is to be observed, that although the arrest is by open.

(a) Ex parte Whitchurch, 1 Atk. 1835, 32.

(n) Imp. Off. Sheriff, 61.

(p) Imp. Off. Sheriff, 46. (q) Ibid. 59. (r) 1 Harr. 110.

Where the sheriff neglected to serve an attachment until it was too late for the defendant to appear at the time and place where it was returnable, the Court set aside the arrest of the defendant thereon. Ib.

(2) After an arrest of a questionable nature in a house, the prisoner surrep-

⁽¹⁾ If the sheriff does not receive the attachment in time to arrest the defendant and bring him into Court on the return day, at the place where the attachment is returnable, he should not arrest him thereon, but should return the process tarde. Stafford v. Brown, 4 Paige, 360.

Attachment.

Execution of a bailiff or other officer, it is considered as the act of the sheriff, who makes his return accordingly.

> If the defendant is taken he must either go to prison for safe custody or put in bail to the sheriff, for the intent of the arrest being only to compel an appearance in Court at the return of the writ, that purpose is equally answered whether the sheriff detains his person or takes sufficient security for his appearance (s). The sheriff may, however, if he pleases, let the defendant go at large without any sureties; but that is at his own peril, for after once taking him the sheriff is bound to keep him safely, so as to be forthcoming in Court (t).

If sheriff permits defendant to go at large.

Of putting in bail.

The method of putting in bail to the sheriff is by entering into a bond or obligation, with one or more sureties, to ensure the defendant's appearance at the return of the writ, which obligation is called a bail-bond (u) (1). The statute 23 H. 6, c. 9, having prescribed in what cases the sheriff may take a bail-bond in actions emanating from courts of Law, and prohibited the taking a bond in all other cases, a doubt appears to have been raised whether the sheriff has or has not a right to take a bail-bond upon attachments issuing out of the Court of Chancery; but this question has been set at rest by the decision of the Court of Common Pleas in Morris v. Hayward (z), by which it was determined that a shorter way take a bail hand an an attachment out of Chancery, but that he is not compellable to do so, and that whether a bail-bond shall be taken or not, is in the discretion of the sheriff, as regulated by the practice of that Court. The consequence is, that an action at Law will not lie against the sheriff, under the above-mentioned statute, for refusing to take bail from a defendant arrested under an attachment issuing out of the Court of Chancery (y).

Bail-bond.

The practice of the Court, however, seems to be, that where a party is taken up on an attachment for a contempt, he may, when the contempt is of a bailable nature, on payment of the costs, which are 13s. 8d., be admitted to bail by entering into a bail-bond to the plaintiffs to the amount of 401, himself, with two sureties in 201,

(s) 3 Bl. Com. 290.

(z) 6 Taunt. 569.

(t) Ibid.

(y) Studd v. Acton, 1 H. Blackst. 468.

(w) Ibid.

titiously got out of the house, and was arrested in the high road, and this second arrest was held to be legal. Snowball v. Dixon, 4 Younge & Coll. 511. (1) Where an attachment is in the nature of mesne process, the sheriff may take bail for the party's appearance; and on a return ceps, the sheriff may be ordered to bring in the body; or he may sue on the bail bond. Binney's case, 2 Bland, 99; Deakins's case, ib. 398. each, to appear or answer, as the case may be, at the return of the Execution of writ (z).

Attachment.

It is to be observed, that a contempt in not paying costs of obey- Contempt by ing an order or decree is not of a bailable nature, and that the non-payment of costs, or not sheriff cannot take bail to an attachment issued on the account (a). obeying order

Where a sheriff, having taken a defendant into custody upon an or decree not bailable. attachment, takes bail for his appearance, he may assign the bailbond to the plaintiff (b), who, if the defendant neglects to appear, or to put in an answer, may put the bail-bond in suit against him.

The plaintiff may also have a messenger into the county where the defendant lives, to arrest the defendant, and bring up his person to the Court, which is the more effectual way of proceeding (c). This, however, will not preclude him from bringing an action at Sendinga This, however, will not preclude him from bringing an action at messenger the same time upon the bail-bond against the defendant and his will not presureties, otherwise the giving a bail-bond would be quite useless (d); clude action and it is to be observed that if an action is brought on the bail-on bail-bond. bond, the defendant cannot obtain an order to restrain the defendant from proceeding in it without first clearing his contempt (e).

Where a defendant has been arrested upon an attachment, and either sent to prison or been admitted to bail, the sheriff has obeyed the writ, and performed all that he is required to do. In this respect Difference bethere is a difference between a capias at Law and an attachment. tween a capias "Upon a cepi corpus returned upon a capias at Law they amerce ment. the sheriff if he does not bring in the body, upon the statute of Westminster 2, c. 29: and this is upon the words of the capias, which are, 'So that you have his body before us to answer A. W. of a plea of trespass upon the case.' So that the command of the writ is not obeyed unless he hath the body ready. In an attachment the form of the writ is, 'So that you have his body before us to answer us, as well of a certain contempt by the aforesaid A. B. against us committed, as is said, as what shall be then and there alleged against him; and further, to do and receive whatever our said Court shall think proper in this behalf, and that you do by no means omit, and have here this writ.' By which words, it would seem. they might amerce the sheriff for not bringing in the body, as they did upon the capias at Common Law: but because the writ was originally founded upon a contempt, it seems that where the sheriff has taken up the body he has paid obedience to the writ, though he does not actually bring him up to the Court; because the contempt only induces a commitment, which is satisfied by imprisonment in

⁽z) Hind. 106.

⁽a) Anon. Prec. Chan. 331. (b) Anon. 2 Atk. 507.

⁽c) Anon. 2 Atk. 507. (d) Beddall v. Page, 2 Sim. 224. (e) 1 Turn. & V. 115.

to an Attach-

Of the Return the county goal: and the Statute of Westminster 2, only relates to original and judicial writs, and not to these prerogative processes. and therefore they issued as habeas corpus, which is an undoubted writ within the statute upon which it is proper to ground an amercement" (f).

Returns must be in the name of the sheriff.

All processes against any person, directed to the sheriff, ought to be duly and truly executed, and returned into the Courts out of which they issued (g); and all returns, although made by the undersheriff, yet must be made in the name of the high-sheriff, and his name must be put thereto, or it is void (h).

Must be true.

The sheriff must also return truly, and not contrary to the record; if he does, he falsifies all his proceedings (i).

If the sheriff takes the party to goal he should lose no time in so doing, as otherwise the time may expire within which the plaintiff is bound to bring up the defendant to answer his contempt under 1 Will. IV. c. 36, s. 15, rule 4, and Order 74, of May, 1845.

Ought to be on the day named.

The return ought to be made before or upon the day of return named in the writ, if a day certain is named; but if the writ be returnable on a return day not certain, the sheriff need not return it till the quarto post (k).

Or if returnaly, as soon as it is executed.

An attachment returnable immediately should be returned as soon ble immediate- as it is executed; but it is in force till the last return of the term following the teste. If executed after that time it is liable to be discharged for irregularity. The party prosecuting the contempt, however, is at liberty to call upon the sheriff for his return to an attachment returnable immediately on the fifth day after it is put into the sheriff's hands.

If return iff may be amerced, or committed.

If the sheriff or other officer does not make his return of the writ not made sher. directed to him, this Court may amerce him, and the amercements are commonly 51, and are to be levied by being estreated into the Exchequer, or by process out of the petty bag to the succeeding sheriff to levy and pay them into the Hanaper. But it is usual to give the sheriff a day for that purpose, and if he do not by that time return the writ, the Court will set the amercement (1).

Of proceedings against the sheriff.

The general course of proceeding, however, to compel the sheriff to return an attachment is first to procure an order upon the sheriff to make the return; then a second order that he return is within a

f) Gilb. Chan. 83. Imp. Off. Sheriff, 333. (Å) Ibid. 334.

⁽i) Imp. Off. Sheriff, 334. (k) Makepeace v. Dillon, ibid. 363. (1) 1 Harr. 118.

given time, or stand committed; and after that a third order that he Of the Return do stand committed (m) (1). Attachment.

Where an attachment has been issued to the Chancellor of the county palatine of Lancaster, and he omits to return the writ, a Or against Chancellor of peremptory order must be made upon him to return it within a county palacertain number of days after service of the order. Upon which, if time of Lanhe returns "that he hath sent his mandate to the sheriff, who hath caster. not returned the same," another peremptory order will be issued When his to the sheriff, commanding him within a certain number of days sheriff does after service of the order upon his under-sheriff to return the man-not obey the mandate. date (n).

Upon an attachment there are two ordinary returns: if the defen- Non est indant cannot be arrested, the sheriff returns that A. B. is not found ventus. within his bailiwick; this is termed a non est inventus, and upon this return, further process of contempt is grounded. The other return is, " I have attached the within-named A. B. as within I am commanded," and it is called a return of cepi corpus, which when Cepi corpus. once returned, puts an end to all the ordinary process (s); unless the defendant afterwards escapes or absconds, in which case, the Serjeant-at-arms may be sent for the purpose of grounding a sequestration (2).

When the sheriff makes this return, if the defendant is not other- When sheriff wise charged, and he hath taken a bail-bond for his appearance, he has taken bail. adds that "he hath the defendant ready" (t); but if the defendant Where defendant in prison. be in prison, and is not out on bail-bond, the sheriff adds to his return " that he hath the defendant in his safe custody, in Her Majesty's goal, for his county," &c. (u).

It is to be noticed that if the writ is directed to the Chancellor of Return by Lancaster commanding him to issue his mandate to his sheriff to Chancellor of Lancaster. attach the party, the return is, that he has issued his mandate according to the terms of the writ, and that the sheriff has made the

(m) Clough v. Cross, 2 Dick. 555,

(s) Frederick v. David, 1 Vern. 344; Hind. 100.

(n) Ibid. 558.

(t) Johnson v. Aylet, 2 Dick. 658. (u) Ibid.

⁽¹⁾ In New York, the officer executing the attachment must return the same by the return day specified therein, without any previous order for the purpose. In case of default, an attachment may forthwith issue against the officer; which will not be bailable. People v. Elmer, 3 Paige, 85.

But he may return the same at any time during the actual sitting of the Court on the return day thereof, unless he is specially directed by the Court to return it immediately. It is therefore irregular to take out an attachment against him ex parte during the sitting of the Court on that day. People v. Wheeler, 7 Paige, 433.

⁽²⁾ See Hook v. Ross, 1 Hen. & Munf. 319, 320.

Costs.

Attachment.

Form of the return to him either of cepi corpus, or non est inventus, as the case may be.

The costs of an attachment issued, but not executed, are 11s. 2d.: if executed, 13s. 8d.

When the sheriff attached the party and took bail of him, the old practice was for the plaintiff to move for a messenger to bring up the defendant, but now a messenger cannot be obtained to compel appearance (x), and it would consequently seem that, upon such a return the plaintiff has no other course open to him, except to enter an appearance for the defendant, under the 29th Order of May, 1845 (y).

When the sheriff returns " non est inventus," the plaintiff may if he pleases issue other attachments for the purpose of obtaining the arrest of the defendant, but he cannot obtain an order for the Serjeant-at-arms (z), and consequently he cannot have a writ of sequestration to compel appearance; moreover, as in the event of the defendant being arrested, it will be incumbent upon the plaintiff to enter an appearance for him, a course which after the service of the subpæna he can adopt without arrest, there does not seem to be any case in which it will be for the plaintiff's interest to continue a compulsory process after a return of non est inventus.

When the sheriff actually arrests the defendant for want of appearance, the plaintiff must bring him up by habeas corpus to the bar of the Court, within thirty days from the time of his being actually in custody or detained (being already in custody), upon process of contempt, and if the last of such thirty days happen out of Term, then within the four first days of the ensuing Term; and in the event of his not doing so, the defendant is entitled to be discharged out of custody, and to have the costs of the contempt paid by the plaintiff (c). And further, when the defendant, who is in custody for contempt incurred by not appearing, or who being already in custody is detained by an attachment for such contempt, does not enter an appearance within twenty-one days after he is lodged in gaol or detained, the plaintiff must, within fourteen days after the expiration of such twenty-one days, cause an appearance to be entered for the defendant, and if he does not do so the defendant will be entitled to be discharged out of custody, without paying any costs of the contempt, unless

⁽x) 7th Order, August, 1841.(y) See page 517.

⁽z) Ibid. (c) 1 Will. IV. c. 36, s. 15, rule 5.

the Court shall see good cause to remand and detain him in cus- When Defendant Arrested. tody (d).

### SECTION V.

## Of Compelling Appearance of Particular Defendants.

HAVING now considered the mode of compelling the appearance of a defendant upon whom service of the subpæna has been effected, and who is not entitled to any particular privilege or under any peculiar disability, the next point is, in what manner the appearance of persons under such circumstances can be obtained.

In the first place, if the Attorney-general, upon being served Attorney-genwith a copy of the bill, does not appear, no personal process issues against him to compel him so to do, but if he will not appear it seems that it would be considered as a nihil digit (e).

If the defendant claim the privilege of the peerage, and do not Peers. after being served in manner aforesaid with a letter missive put in his appearance, he must be served with a subpoena, and in the event of his not then entering his appearance, the process both against an adult and an infant peer (f), and also against any member of Parliament who has been served with a subpoena is the Members of same — viz., by motion of course an order for a sequestration Parliament. nisi against the defendant is obtained (g).

In order to obtain a sequestration against a peer or bishop (h) By sequestraan affidavit must be made of the service of the letter missive, and tion. of the copy of the petition upon which it has issued, and also of the service of the subpæna, and of the copy of the bill. Where the process is required against a member of the Commons' House of Parliament, the affidavit need only verify the service of the sub-A motion must then be made for a sequestration against the defendant's real and personal estate, which the Court orders of course nisi (that is,) unless the defendant being personally serv- Sequestration ed with the order, shall within eight days after such service show unto the Court good cause to the contrary. The defendant must

(d) 1 Will. IV. c. 36, s. 15, rule 13. stead of suspension are stated. (e) Barclay v. Russell, 2 Dick. 729.

(f) 1 Cha. Ca. 16. (g) Vide Hind. 143, and Corbyn v. Birch, 2 Dick. 635, where the reasons for proceeding by sequestration in- a sequestration. Hind. 131.

(h) Formerly, if a peer of the realm appeared and did not answer, an attachment lay, but now, by order of Parliament, no process lies but Peers and Members of Parliament.

be served personally with this order, and if he persist in refusing to appear, then an affidavit of service must be made, and counsel instructed to move to make the order absolute. It is to be observed, that where an order nisi for a sequestration against a peer or member of the House of Commons, for want of an answer, has been obtained, it is good cause to show against making such order nisi absolute, that the answer has been put in. In Lord Clifford's case (i), Sir Joseph Jekyll, M. R., laid it down, that there be a sequestration nisi against a peer for want of an answer, and the peer puts in an answer which is insufficient, yet the order for a sequestration shall not be made absolute, but a new sequestration nisi must be issued; and in this his Honor was confirmed by Mr. Goldsborough, who was then the Registrar. In a subsequent case, however, before Lord Hardwicke, his Lordship said, that if there be a sequestration misi for want of an answer against a member of Parliament, and he puts in an answer before the order is made absolute, and exceptions are taken to this answer, the Court will enlarge the time for showing cause till it shall appear whether the answer is sufficient or not (k).

How sequestration made absolute. When the order for making the sequestration absolute is drawn up, passed and entered, the plaintiff's solicitor must make out the writ of sequestration (I), which the Court will not discharge till the party has appeared and paid the costs of the process; and then he may move to discharge the sequestration, upon notice to the adverse party if it be executed, which will be granted of course.

Personal service of order nisi dispensed with.

Personal service of the order nisi may be dispensed with, in cases where a peer, &c., keeps within his own house, or is surrounded by his servants to avoid service, or where the party serving the process is denied access, and it is very difficult and almost impossible to serve the order personally. But in order to enable the plaintiff to dispense with personal service, it is necessary to apply to the Court to substitute a service by leaving, in lieu of it, grounding such application upon a proper affidavit of the particular circumstances of the case, upon which the Court will exer-

(i) 2 P. Wms. 385.

the course of the Court; but upon reference to the Registrar's book, where the order is entered under the title of Buller v. Rashleigh, it appears that the time for showing cause was enlarged till the next seal. Reg. Lib. 1750. A. 495 (b).

(l) 16th Order, October, 1842.

⁽k) Butler v. Rashfield, 3 Atk. 740. From the observation of the reporter appended to this case, it may be inferred that upon the authority of what the Registrar had said in Lord Clifford's case, Lord Hardwicke had allowed the cause shown, as being

cise a discretion, and make the order, if the facts stated in the affidavit are strong enough to warrant such a proceeding (m).

Where a peer defendant avoided the service of an order nisi for sequestration, the Court of Exchequer made an order that service Service of order nisi for thereof upon his clerk in Court, and at his dwelling-house, or if sequestration. no person should be met with there, by fixing a copy of the order on the door, should be good service (n).

Peers and Members of Parliament.

In Thomas v. Lord Jersey (o), a bill was filed against Lord Jersey, upon which a letter missive, with a copy of the bill, was served on the defendant, by leaving it with one of his female servants at his residence in Berkley-square. His Lordship was then abroad, having left England for the Continent a few months preceding. On his neglecting to appear to the letter missive, a subpæna was served in the same way, and upon his non-appearance to that, an order nisi for a sequestration was issued, when, upon inquiry at his Lordship's house, it appeared that he was still on the Continent, and thereupon, on an affidavit being made of these facts, the V. C. of England directed that service of the sequestration nisi at his Lordship's house should be good service; and upon a subsequent motion to discharge the V. C. of England's order, Lord Brougham refused the motion (p).

The same course of proceeding in suing out and issuing the As against sequestration is observed where it is sought against an officer of court. the Court as in the case of peers, with the exception that the affidavit upon which the order nisi is applied for must be confined to the service of the subposna, there being no letter missive as in the case of a peer, &c.

The form of the sequestration issued against peers and other Form of the privileged persons is nearly the same as that issued in cases of contempt by ordinary persons, with the exception that it recites the order misi, and the order for making it absolute.

The manner of issuing and executing it, and the consequences How issued. arising from it, are similar to those of ordinary sequestrations (q).

By the statute 1 Will. IV. c. 36, s. 12, it is enacted, that in case any defendant, having privilege of Parliament, shall upon a return of process of sequestration issued against him for not putting in an appearance to any original or other bill of complaint instituted against him in a Court of Equity for enforcing discovery and relief, or discovery alone (as the case may be), neglect

(m) Hind. 81. (a) Mackenzie v. Marquis of Pow-Scacc. 19 May, 1739, 1 Fowl.

(o) 2 M. & K. 398.

(p) Vide Attorney-general v. Earl of Stamford, 2 Dick. 744.

(q) See page 545, and post, section on Enforcing the Execution of Decrees.

against Officers of the Court. Sequestration:

Sequestration continue disobedient, a pluries distringus issues. There must be fifteen days between the teste and return of each of these writs. If the last-mentioned distringus fails of effect, upon the pluries distringus being returned by the sheriff, a commission of sequestration may be obtained against the corporation. This commission is usually directed to five persons named by the plaintiff, directing them to sequester the goods and chattels, the rents and profits, and real estate of the corporation, until they shall appear or answer the plaintiff's bill, or the Court make further order to the contrary. A sequestration cannot be discharged till the corporation have performed what they are enjoined to do, and paid the costs of the several distringuses, and of the sequestration, including the commissioner's fees; but upon their doing this, they may upon motion get the sequestration discharged.

how discharged.

> By one or other of these forms of process, appearance may in almost all cases be compelled after service of the subpoena has been effected; but as the plaintiff can himself enter an appearance for the defendant, it does not seem probable that hereafter it will frequently be necessary to carry out process of contempt, for the purpose of compelling appearance.

Costs of entering appear-ance for defen-

By the 35th Order of May, 1845, the plaintiff having entered an appearance for a defendant, is entitled as against the same defendant to the costs of and incident to entering such appearance. whatever may be the event of the suit; and such costs are to be added to any costs which the plaintiff may be entitled to receive from such defendant, as set off against any costs which he may be ordered to pay to such defendant, but payment thereof is not to be otherwise enforced, without the leave of the Court.

Defendant may afterwards appear for himself.

The defendant, on the other hand, notwithstanding an appearance may have been entered for him by the plaintiff, may afterwards enter an appearance for himself in the ordinary way; but such appearance, by such defendant, is not to affect any proceeding duly taken or any right acquired by the plaintiff, under or after the appearance entered by him, or prejudice the plaintiff's right to be allowed the costs of the first appearance (z).

(z) 36th Order, May, 1845.

for the defendant in such manner and at such time as the Court Defendantsout shall direct (r). diction.

The 33rd Order of May, 1845, relates, as it has been observed, to suits of all descriptions, and the 4th Article in like manner enables the Court to order an appearance to be entered for the defendant (s).

The affidavits filed for the purpose of providing the service of a subpæna upon any defendant, are to state when, where, and how such subpæna was served, and by whom such service was effected(t).

If a married woman is made defendant jointly with her hus- Married woband (u), no process can generally issue against her without special men. order, but an attachment issues against her husband for want of her appearance, in all respects in similar manner as for his own default (1), but it would seem that when the husband is out of the jurisdiction, service may be effected upon the wife (z), if she is within the jurisdiction, and that after such service, upon special application to the Court, of which notice should be given to her, an order may be obtained for an attachment to issue against her in default of appearance (y)

If a corporation occupies the position of defendant, and due Corporations. service of the subpæna has been effected upon it, then, upon proof of such service, a writ of distringas (2), instead of the writ of attachment, should be prepared, directed to the sheriff or other officer having jurisdiction in the district of the corporation, commanding him to distrain the land, goods and chattels of the corporation, so that they may not possess them till the Court shall make other order to the contrary, and that in the mean time he (the sheriff) do answer to the Court for what he so distrains, so that the defendant may be compelled to appear in Chancery, and answer the contempt. Upon this writ, if the corporation has property, the sheriff usually levies 40s. only, and makes his return accordingly; and if this execution does not procure the obedience of the corporation, an alias distringas, which is a writ commanding the sheriff again to distrain the goods and chattels, lands and tenements, of the corporation, may be obtained. Upon this writ the sheriff usually levies 4l., and if after that the corporation still

(r) See ante, page 507. s) See ante, page 508.

⁽u) Gee v. Cottle, 3 M. & C. 180. (z) Bushell v. Bushell, 1 S. & S.

⁽t) 34th Order, 1845.

⁽y) See post, page 548.

See Leavitt v. Cruger, 1 Paige, 421.
 McKim v. Odom, 3 Bland, 407, 426.

sorv Process may commence.

When defendant obtains an order for further time to answer.

When compul-curity for costs, the day on which the order to give security is served, and the period from thence to and including the day on which such security is given, is not to be reckoned in the compatation (b) allowed the defendant for answering. happens that the defendant, before and (provided no process has issued) even after the expiration of the regular time for answering. obtains an order for further time to answer. Such order was formerly on condition that he should enter an appearance with the Registrar, and consent to a Serjeant-at-arms (c), but by the general Orders of 1845, the necessity for such a condition is abolished; but now, by the 18th of these Orders, if a defendant using due diligence is unable to put in his answer to a bill within the times allowed by Order 16, the Master (on sufficient cause being shown) may allow to such defendant such further time, and on such, if any, terms as to the Master seems just.

Issuing of attachment.

Form of the writ.

Sealing.

Before period for answering expires.

If the defendant does not answer within the regular time, or within the time allowed him by virtue of any order for further time, he has incurred a contempt, and an attachment may issue against him (1). When the defendant thus becomes liable to be attached, the plaintiff's solicitor may prepare a writ similar in form to that issued upon non-appearance, except that the endorsement states it to be for not answering (d). To procure the sealing of this writ no affidavit is necessary, the contempt being evident from the date of the appearance; and if, when the writ is applied for, no answer is on the file, and the time allowed has expired, the Clerk of Records and Writs will affix his seal to the writ, which may be issued similarly, as before stated, in the case of default in appearance (e). The Orders of May, 1845, in one instance enable a plaintiff to attach a defendant who has made default in entering his appearance, even before the period for answering has expired, for by the 72nd Order it is provided, that if there is just reason to believe that any defendant means to abscord before answering the bill, the Court may, on the ex parte application of the plaintiff, at any time after appearance has been entered for such defendant by the plaintiff, order an attachment for want of answer to issue

(b) 13th Order, Dec. 1833, discharged and re-enacted by 15th Order, May, 1845.

- (c) 21st Order, December, 1833.
- (d) See ante, page 518. (s) Ante, page 521.

⁽¹⁾ See Matter of Vanderbilt, 4 John. Ch. 58, sited ante, 518, in note. If the plaintiff makes oath, that a discovery is necessary, he is entitled to an order that the defendant answer the bill or be attached; and the Court will not, in that stage of the cause, inquire whether a discovery is necessary. Stafford v. Brown, 4 Paige, 360. See post, 545, note.

against him, and such attachment is to be made returnable at such time as the Court directs.

Attachment.

A custom prevailed among the Six Clerks of the plaintiff's Custom of clerk in Court giving to the defendant's clerk in Court one or more giving notice notes, calling for an answer before an attachment was issued; and the writ, probably now that the office of Six Clerks is abolished, a similar practice will prevail between the solicitors of the different parties. The effect of such a note is, that the plaintiff on whose behalf it is given, precludes himself from issuing the attachment, until the defendant has had a reasonable time either to put in his answer, or to obtain an order for further time so to do (f).

An order for further time cannot be granted after an attachment; moreover the writ is considered to issue the first moment of the day on which it is sealed and tested (g), and an order for time not being complete until duly served upon the plaintiff, an attachment is therefore regular, and not to be set aside if scaled before service of an order for further time, notwithstanding such order has been previously obtained (h).

The sheriff may, as before in the base of appearance, either re- Of return to turn non est inventus, or he may arrest the defendant and detain the writ (1). him in custody, or he may arrest him and take bail. It will be convenient to consider separately the course to be adopted by the plaintiff, in respect of each of such returns.

First, if the sheriff attach the defendant, and taking bail return When sheriff accordingly, the plaintiff is entitled as of course to move. upon takes bail (2). production of the sheriff's return, that the messenger may apprehend and bring the defendant to the bar of the Court; thereupon if the messenger take the defendant into custody, he must be brought to the bar of the Court within ten days, for the 73rd Order of May, 1845 (i), provides, that if he is not brought to the bar of the Court within ten days after he was taken into custody, he is to be discharged out of custody by the Serjeant-at-arms or messenger in whose custody he is, without payment by him of the costs of his contempt, which in such cases are to be paid by the plaintiff; but if such defendant does not put in his answer within eight days after such discharge; the plaintiff may cause a new attachment to be issued against him for want of his answer.

Secondly, if the sheriff attach the defendant, but without tak- If sheriff at-

(f) Barritt v. Barritt, 3 Swan. 395; Taylor v. Fisher, 6 Sim. 566. (g) Stephens v. Neale, 1 Mad. 550.

(h) Kirkpatrick v. Meers, 2 Sim. fendant and

(i) See also 1 Will. IV. c. 36, s. prison, 15, rule 5.

commit him to

⁽¹⁾ See ante, 525, note. (2) See ante, 526, note.

By Attachment.

ing bail either commit him to prison, or detain him if he be in prison, and return accordingly, then upon such return, instead of a messenger the plaintiff must move for a habeas corpus to the gaoler, so that the defendant may be brought up to the bar of the Court within thirty days after his arrest; for by the 74th Order of May, 1845 (k), if any defendant be in prison under, or being already in prison be detained under, an attachment for not answering, and be not brought to the bar of the Court within thirty days from the time of his being actually in custody or detained, (being already in custody under such attachment,) he is to be discharged from the process for want of answer, under which he was arrested or detained by the sheriff, gaoler or keeper of the gaol. in whose custody he is, without payment of the costs of his contempt, which in such case are to be paid by the plaintiff; but if such defendant does not put in his answer within eight days after such discharge, the plaintiff may cause a new attachment to be issued against him for want of his answer.

It appears that during the vacation bringing up a prisoner to the private house of the judge is sufficient to satisfy the terms of this order (1).

When defendant brought to bar of the Court.

In either of these cases, whether the defendant be brought to the bar of the Court by the messenger, or upon habeas corpus by the gaoler, he is upon motion of course by the plaintiff committed to the Queen's Prison. After such commitment the plaintiff is at liberty to move as of course upon the production of the certificate of the keeper of the Queen's Prison for a habeas corpus cum causis directed to the keeper of the said prison, provided, that there be at least twenty-eight days between the day on which the said defendant was so committed to the Queen's Prison, and the return of such writ of habeas corpus (m); and the practice in general has been, that the same order which directs the issuing of this habeas corpus, should go on to direct that, upon the day of the return thereof, (which may be either in Term time or vacation,) the Clerk of Records and Writs shall attend with the record, in order that the bill may be taken pro confesso (n).

No time must be lost by the plaintiff in these proceedings, for should the defendant not answer within two calendar months after he is put in gaol, or being in gaol is detained, the plaintiff must, within six weeks after the expiration of two calendar months, obtain an order for taking the bill pro confesso; and in default

⁽k) Ibid. (n) Simmons v. Wood, 2 Hare, (l) Clark v. Clark, 1 Ph. 116. (24) (35) 1 Will. IV. c. 36, s. 15, rule 2.

thereof upon application to the Court, the defendant is entitled to be discharged without paying any of the costs of the contempt, unless the Court shall see good cause to remand and detain him in custody.

By Attachment.

The Orders, however, of May, 1845, without superseding the Serving depractice just stated, have given to the plaintiff an easier mode of fendant with obtaining an order to have his bill taken pro confesso, in the event tion to take of the attachment being executed upon the defendant; for by the the bill pro 76th Order, it is provided, that, upon the execution of an attachment for want of answer against any defendant, or at any time within three weeks afterwards, the plaintiff may cause such defendant to be served with a notice of motion, to be made on some day not less than three weeks after the day of such service, that the bill may be taken pro confesso against such defendant; and thereupon, unless such defendant has in the meantime put in his answer to the bill, or obtained further time to answer the same, the Court, if it so thinks fit, may order the bill to be taken pro confesso against such defendant, either immediately, or at such times and upon such terms, and subject to such conditions, as under the circumstances of the case, it thinks proper (1).

If the defendant, upon the return being made by the sheriff, be When defen in gaol for a misdemeanor, he may be brought up in like manner for misdebefore the Court by habeas corpus, and thereupon he is turned meanor. over pro forma to the Queen's Prison, though actually carried back to the prison from whence he came with his cause; and thereupon a second writ of habeas corpus issues, similar in all respects to that before mentioned, except in being directed to the gaoler or keeper of the prison to which the defendant has been carried back. Upon the return thereof, the defendant is brought before the Court, and remanded to the prison from whence he came with his cause, without being turned over again to the Queen's Prison: and the bill may be taken pro confesso in the same manner in all respects as if the defendant had been all along in the custody of the keeper of the Queen's Prison (m).

Should it turn out that the defendant is under sentence for felo- When under ny, there is apparently no power in the Court to order his remofelony. val until expiration of the sentence (n), and consequently, in such a case, it seems that previous to the 76th Order, of 1845, no

(n) Rogers v. Kirkpatrick, 3 Ves. 573. (m) 1 Will. IV. c. 36, s. 15, rule 4.

⁽¹⁾ See also 49th Article of the 16th Order.

Вy Attachment. order to take the bill pro confesso could have been obtained, nor could any answer have been enforced as against a defendant in such a position.

Right of defendant to be dis-36, rule 13.

It may be observed with respect to the 73rd and 74th of the charged under same Orders (o), and the fifth rule of the stat. 1 Will. IV. c. 36, 1 Will. IV: c. by which the plaintiff is compelled to bring the defendant before the Court within a certain period after arrest or detainer; and in default thereof, the officer having him in custody is directed to discharge him, all costs to be paid by the plaintiff, that the language is more stringent than that of the 13th rule of the same statute, which directs that if the plaintiff do not obtain an order to take the bill pro confesso within a certain period, "the defendant shall, upon application to the Court, be entitled to his discharge, without paying the costs of his contempt, unless the Court shall see good cause to remand and detain him in custody."

Right of defendant to be discharged.

There seems to be some difference among the Judges as to the effect of the language of this latter section concerning the point, whether it confers upon the defendant so absolute a right to his discharge as that it cannot be waived by any act done by him, either previous or subsequent to the expiration of the period specified.

The V. C. of England has decided (p) that an answer put in by a prisoner, when entitled to his discharge, inasmuch as it prevents the plaintiff from having the bill taken pro confesso, deprives the defendant of the right conferred upon him by the statute, of being discharged without payment of the costs of the contempt, and Sir J. Wigram, V. C. (q), was of opinion, that an application for time to answer, made by the defendant, prior to being entitled to his discharge, and the acceptance of the time thereupon given, prevented the operation of the statute, and placed the defendant in the situation he would have been in had its provisions never been enacted.

Whereas, according to Lord Langdale, M. R. (r), a defendant obtaining leave to answer, subsequent to the period when he becomes entitled to his discharge, has still a right to the benefit of the statute, which right he has neither power nor capacity to waive.

Thirdly, if the sheriff be unable to attach the defendant, and When sheriff returns non est return accordingly, there are different modes whereby, under difinventus.

⁽o) Pages 539 & 540. (q) Wo (p) Williams v. Newton, 11 Sim. Hare, 510. (q) Woodward v. Connebeer, 2 (r) Haynes v. Ball, 4 Beav. 101.

ferent circumstances, the plaintiff may proceed to take the bill pro confesso.

Βy ttachment

By the 9th Order of August, 1841, if an affidavit can be made, Writ of sequesshowing that due diligence was used to ascertain where such de- tration may be obtained imfendant was at the time of issuing such writ, and also in endea-mediately. voring to apprehend such defendant under the same; and that the person suing forth such writ verily believed at the time of suing forth the same, that such defendant was in the county into which such writ was issued, then upon motion, supported by such an affidavit, the plaintiff may obtain an order for a writ of sequestration.

But the affidavit must be precisely in the words, or at least go to the full extent of the language just mentioned; and hence it is often impossible, from the conduct of the defendant, to frame an affidavit in the proper terms (s).

If such an affidavit cannot be made, another course for the Or Serjeantplaintiff to adopt is, upon the sheriff returning non est inventus, to move, as of course, for the Serjeant-at-arms to take the defendant. If the Serjeant-at-arms arrest the defendant, then the same course with respect to bringing the defendant to the bar of the Court must be pursued, as if the defendant had been arrested by the messenger (t).

On the other hand, if the Serjeant-at-arms certify that the defendant cannot be found, so as to be apprehended, then upon motion of course, supported by production of an office copy of such certificate, the plaintiff is entitled to an order for a writ of sequentration.

In either of the above cases, that is, whether the writ of sequestration is ordered upon motion, supported by the affidavit mentioned in the last page, or upon the return of the Serjeant-at-arms. the plaintiff may at once obtain an order to take the bill pro confesso, which is, of course, after an order for a writ of sequestration has issued.

The writ of sequestration is always obtained upon motion; if it Upon return be moved for upon a return of non est inventus, by the Serjeant-atarms, the counsel who moves should have the warrant with the return in his hand (x). According to the practice before the Orders of August, 1841, the Serjeant-at-arms was the only officer upon whose return such process could be issued (y) (1). It has

⁽s) Davis v. Hammond, 5 Sim. 9.

⁽x) Hind. 136.

⁽t) See ante, page 539.

⁽y) See 9th Order, Aug. 1841.

⁽¹⁾ See Hook v. Ross, 1 Hen. & Munf. 319, 320.

By Sequestration.

not been the practice, to issue sequestrations where the defendant was in custody for contempt upon mesne process, because the stat. 1 Will. IV. c. 36, enables the plaintiff to obtain the effect of that process, either by entering an appearance for him under sect. 11. or by taking the bill pro confesso against him, under the 15th section of that Act.

Order to take bill pro confesso, of course upon sequestration.

According to the old practice of the Court, independent of recent Orders and Statutes, an order to have the bill taken pro confesso, was of course upon the issuing of the writ of sequestration. even though it was not executed. In consequence of this rule, it does not seem that it ever has been the ordinary practice to execute writs of sequestration upon mesne process; and an opinion appears at one time to have prevailed, that such an execution was irregular. This opinion seems to have arisen in consequence of what was said by Sir Thomas Sewell, M. R., in Heather v. Waterman (z), and Vaughan v. Williams (a), where he expressed an opinion that when a bill had been taken pro confesso on a sequestration for want of an answer, the execution of the sequestration was unnecessary and improper. These cases appear to have been cited by Mr. Dickens, the Registrar, in the notes handed up by him to the Lords Commissioners of the Great Seal, in Rowley v. Ridley (b), in support of the distinction taken by him between sequestrations in mesne process and for a duty, namely, that a mesne process ought not to be executed; but upon reference to those cases, it appears that they go no further than to show that when the plaintiff intends to proceed to have the bill taken pro confesso against the defendant, the execution of the sequestration is unnecessary, and therefore improper, because the object of executing the sequestration being merely to compel an answer from the defendant, the same purpose is effected by taking the bill pro confesse against him, (by which process the plaintiff obtains the same decree that he would have been entitled to had the defendant put in his answer and admitted the whole case made by the bill,) and this being accomplished, the process drops as a matter of course. and the sequestrators become accountable, not to the plaintiff or to the Court, but to the defendant.

In fact, the practice appears to be that a plaintiff, upon obtain-

306, n. (b), Lord Thurlow is reported to have said that he could see so foundation, either in the reason of the thing, or in the history of the Court, for supposing that a sequestration to compel an appearance or answer, should not be executed.

⁽z) 1 Dick. 335. (a) Ibid. 354.

⁽b) 2 Dick. 622. It appears from the statement of this case by the Solicitor-general in Simmonds v. Lord Kinnaird, 4 Ves. 735, 739, that this case is erroneously reported; and in the note of the same case in 3 Swanst.

ing a sequestration against a defendant for want of an answer, has an option whether he will proceed to take the bill pro confesso, or to compel answer: if the circumstances of the case are such that In what cases justice can be obtained by taking the bill pro confesso, he ought executed. not to cause the sequestration to be executed; but if his case is such that an answer from the defendant is necessary, he may (1). It should be observed, however, that the cases in which a plaintiff can have occasion to compel an answer from a defendant instead of taking the bill pro confesso against him are comparatively few, and are in general confined to bills of discovery, where the answer is wanted to be read at Law, or to obtain some admission from him on which to found some application to the Court, and that, unless in such cases, the proper course to adopt is that of taking the bill pro-confesso; for these reasons, the writ of sequestration is very rarely executed, upon mesne process, and it will be more convenient to treat of the practice upon the execution of a writ of sequestration hereafter, in the Section concerning the proceedings to enforce decrees.

Вy Sequestration.

Still further to facilitate the proceedings of the plaintiff, should Order to take the defendant not be arrested upon the attachment, it has been confesso when provided, by the 77th Order, of May, 1845, that in cases where defendant abany defendant, either being or not being within the jurisdiction of sconds. the Court, does not put in his answer in due time after appearance entered by or for him; and the plaintiff is unable with due diligence to procure a writ of attachment or any subsequent process, for want of answer, to be executed against such defendant, by reason of his being out of the jurisdiction of the Court, or being concealed, or for any other cause, then such defendant is, for the purpose of enabling the plaintiff to obtain an order to take the bill pro confesso, to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court.

The 78th Order provides, that in cases where any defendant who, under Order 77, may be deemed to have absconded or to When defenhave refused to obey the process of the Court, has appeared in dant abscords person or by his own solicitor, the plaintiff may serve upon appearing. such defendant or his solicitor a notice, that on a day in such notice named, (being not less than fourteen days after the service of such notice,) the Court will be moved that the bill may be taken pro confesso against such defendant; and the plaintiff is, upon the

⁽¹⁾ Except in the case of a bill of discovery, an attachment ought not to be issued, but will be set aside, as the object of the suit may be fully obtained by taking the bill pro confesso. O'Brien v. Manders, 2 Irish Eq. 39; Wilson v. Shawe, Craw. & Dix, 62.

pro confesso.

By taking Bill hearing of such motion, to satisfy the Court that such defendant ought, under the provisions of Order 77, to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court; and the Court, being so satisfied, and the answer not being filed, may, if it so thinks fit, order the bill to be taken pro confesso against such defendant, either immediately, or at such time, or upon such further notice as, under the circumstances of the case, the Court may think proper (d).

After appearance entered for him.

The 79th Order relates to cases where the defendant has had an appearance entered for him, and provides that, where any defendant who, under Order 77, may be deemed to have absconded to avoid, or to have refused to obey, the process of the Court, has had an appearance entered for him under Orders 29, 31, or 32 (e); and has not afterwards appeared in person or by his own solicitor, the plaintiff may cause to be inserted in the London Gazette, a notice, that on a day in such notice named, (being not less than four weeks after the first insertion of such notice in the London Gazette,) the Court will be moved, that the bill may be taken pro confesso against such defendant, and the plaintiff is upon the hearing of such motion to satisfy the Court that such defendant ought under the provisions of Order 77, to be deemed to have absconded to avoid, or to have refused to obey, the process of the Court; and that such notice of motion has been inserted in the London Gazette, at least once in every week from the time of the first insertion thereof, up to the time for which the said notice is given; and the Court being so satisfied, and the answer not having been filed, may, if it so thinks fit, order the bill to be taken pro confesso against such defendant, either immediately, or at such time, or upon such further notice, as under the circumstances of the case the Court may think proper.

When defendant in custody.

By the 80th Order any defendant being in custody for want of his answer, and submitting to have the bill taken pro confesse against him, may apply to the Court, upon motion with notice to be served on the plaintiff, to be discharged out of custody; and thereupon the Court may order the bill to be taken pro confesse against such defendant, and may order him to be discharged out of custody upon such terms as appear to be just, unless it appears from the nature of the plaintiff's case, or otherwise to the satisfac-

⁽d) The case of Harrison v. Stewardson, 2 Hare, 533, affords a guide to the proof which will be required in proceedings under this Order, as that part of the Order of April, 1842 (now

discharged) under which it occurred, was similar to the 77th Order of May, 1845.

⁽e) See ante, page 517,518, and 534.

tion of the Court, that justice cannot be done to the plaintiff with- Against particout discovery, or further discovery, from such defendant.

ular Defendants.

#### SECTION II.

## Process against Particular Defendants.

THE course which has been stated, is applicable to the case of an ordinary defendant, not possessed of any particular privilege, and not subject to any disability; it remains to consider the practice to be adopted for the purpose of compelling an answer from defendants of particular descriptions.

First, if the defendant be privileged from arrest, either as a Peers and member of Parliament, or by right of peerage, and the bill is for Parliament. relief, as soon as the time for answering has expired, the plaintiff, instead of issuing an attachment, may move of course for a sequestration nisi, taking care to serve the order personally upon the de-Eight days after such service, the plaintiff may move to make the sequestration absolute upon proof by affidavit of ser- Sequestration vice of the order nisi, and by certificate that no answer has been nisi. filed nor order to show cause entered (1).

Upon the order for the sequestration being made absolute, the plaintiff is entitled, by the old practice of the Court (f), to have the bill taken pro confesso as in the case of unprivileged parties against whom sequestration has issued (g).

If the bill be for discovery (h), it is not necessary for the plain- When bill for tiff to obtain a sequestration, but when the time for answering ex-discovery. pires he may apply at once to have the bill taken pro confesso (2); and thereupon the Court is empowered to make an order nisi that the bill be so taken pro confesso (i), which order it is presumed will be confirmed in like manner as an order for a sequestration

(f) Jones v. Davis, 17 Ves. 368; tiff had independent of statute to Logan v. Grant, 1 Mad. 626. It have the bill taken would appear that the 45 Geo. III. c. return of the writ 124, s. 5, and the 1 W. IV. c. 36, s. See post, page 583. 13, apply only to bills for discovery, but it is apprehended that they do not affect the right which the plain-

have the bill taken pro confesso upon return of the writ of sequestration.

(g) See ante, p. 543. (h) Jones v. Davis, 17 Ves. 368. (i) 1 Will. IV. c. 36, s. 13.

⁽¹⁾ See Matter of Vanderbilt, 4 John. Ch. 58, cited ante, 518, in note.
(2) See O'Brien v. Manders, 2 Irish Eq. 39; Wilson v. Shawe, Craw. & Dix, 62, cited ante, 545, in note; Stafford v. Bunn, 4 Paige, 360, cited ante, 539, in note.

ular defendants.

Against partie- is made absolute. And when such order has has been pronounced, the bill, or an examined copy thereof, shall be taken and read in any Court of Law or Equity in evidence of the same facts on behalf of the same parties as could an answer admitting the contents of the bill (k).

Where the Attorney-general, being a defendant to a suit, fails to answer within a reasonable time, an order may be obtained that he put in his answer within a week after service thereof, or that as against him the bill may be taken pro confesso (m).

Corporations.

In the case of a corporation aggregate not answering within the time limited, the plaintiff may issue the same writs successively, and in the same manner as before stated, to compel appearance (n) (1) and should the corporation stand out process till the order for sequestration issues, then the plaintiff upon the issuing of the writ is entitled to an order to have the bill taken pro confesso, in like manner as in other instances where sequestration has been ordered.

Infants.

Upon a default by an infant defendant, the Court, according to the provisions of the 32nd Order of May, 1845, will upon motion of the plaintiff order a solicitor to be assigned as guardian by whom the infant may answer the bill and defend the suit. This motion must be supported by the same affidavit, as in the case of default in appearance (o) (2).

And even when the infant is a married woman, a guardian must be appointed to put in an answer on her behalf (p).

Married women.

In general when a husband and wife are made defendants to a cause, and no special order has been made with respect to the plaintiff's right to demand an answer, or affecting the liabilities of either husband or wife for not duly answering, the plaintiff is entitled to have their joint answer within the ordinary period after appearance, and in default of such joint answer being put in, the husband alone incurs all the ordinary consequences of contempt (q) (3).

(k) 1 Will. IV. c. 36, s. 14. (m) Groom v. The Attorney-gen-

(o) See ante, page 534. (p) Colman v. Northcoate, 2 Hare, 147.

eral, 9 Sim. 325. (n) See page 535.

(q) Gee v. Cottle, 3 M. & C. 180.

⁽¹⁾ McKim v. Odom, 3 Bland, 407, 426.
(2) Where the infant has already appeared by a guardian ad litem, the guardian may be proceeded against in the same manner as other persons, to compel an answer. 1 Hoff. Ch. Pr. 182.

⁽³⁾ The plaintiff may stipulate to receive the joint answer, sworm to by the husband alone. Leavitt v. Cruger, 1 Paige, 422; post, ch. 16, § 3, note to the point, "Where defendant a married woman."

Their respective rights and liabilities are however often varied upon the application, either of the plaintiff or of one or other of. the defendants.

Married Women.

Thus when the husband is abroad, and the suit relates to the separate property of the wife, or to matters arising out of her claims, the plaintiff may upon affidavit to that effect, and with notice to the wife herself, move that she may answer apart from her husband (r) (1).

Similar orders have been obtained in suits where the wife defended in the character of executrix (s), although from the language of Lord Eldon, there is still room for doubt whether in such cases the plaintiff can proceed against the wife alone in the absence of her husband (t).

It must be recollected, however, that the separate answer of a Separate anmarried woman cannot in any case be filed without a previous swer of. order for that purpose (t), nor can she be viewed as a substantial party to the suit, until such order be obtained, and it is from the date of the order, allowing him to answer separately, that she is entitled to compute the full time for answering without regard to any orders for time previously granted to her husband (u), and it follows therefore, that no attachment can issue against a married woman, until not only an order for her to answer is made, but until the time for answering reckoning from the date of such order has expired.

in her hus-

When a husband is willing to answer jointly, it must not be Wife not supposed that the wife is bound to acquiesce in any answer the bound to join husband may please to put in, nor is the husband justified in hand's answer. using menaces to constrain her consent to an answer contrary to her belief. For such conduct, a husband is punishable as for a contempt (x), and the wife thus conscientiously dissenting, may, upon application to the Court, obtain an order to answer separately. If, however, the wife has herself obtained this order, the

⁽r) Lethley v. Taylor, 9 Sim. 252. (s) Bushell v. Bushell, 1 S. & S.

⁽t) Garey v. Whittingham, 1 S. & S. 163.

^{164;} Bunyan v. Mortimer, 6 Mad. 278; Nayler v. Byland, 9 Sim. 253. (t) Pannell v. Taylor, 1 T. & R.

⁽u) Jackson v. Haworth, 1 S. & S. 159; Bunyan v. Mortimer, 6 Mad. 278.

^{103.} 

⁽z) Ex parte Halsam, 2 Atk. 50.

⁽¹⁾ If the wife be absent, the husband may obtain time to issue a commission to obtain the wife's oath to the answer; and if she refuse to answer, the bill may be taken pro confesso against her. Leavitt v. Cruger, 1 Paige, 422; Ferguson v. Smith, 2 John. Ch. 139. But in New Jersey, if the husband be served, and the wife be out of the State, it is necessary to have an order of publication against her, unless the husband appear for her. Halst. Dig. 170-174.

Married Women.

obtained an order to answer separately. When husband cannot put in a joint answer.

order for him

arately.

plaintiff may proceed to compel answer by attachment, and this right would seem to exist in the plaintiff, whatever be the object When she has of the suit, whether relating to the separate estate of the wife or not (y) (1).

Where the husband is positively unable to conform to the ordinary practice of putting in a joint answer, an order will be granted upon his application for him to answer separately, and he is then exonerated from all liability for his wife's default (2); but the motion for this purpose should be made before he is in contempt, as the Court will not, after he has made default, give him an indulgence to the prejudice of the plaintiff's interests (z). to answer sep- such an application there must be the husband's affidavit, showing that his wifel ives apart, and that he has no influence over her, or otherwise proving inability to answer for her (a).

Notice of the motion should be given to the plaintiff, and also to It seems too that the order ought to direct the wife to answer separately as well as the husband, otherwise the plaintiff may have to apply again before he can bring the former before the Court.

In all cases where the husband wishes to answer separately, an order to that effect ought regularly to be obtained for that purpose before his answer is put in; there are, however, cases where he has answered separately without order, and then applied to the Court that he might not be liable to process, on account of his wife's default in answering; and the application being made before any notice of the irregularity in filing the answer, the Court has made the order (b). But such a course is irregular, and upon motion of the plaintiff, the separate answer of the husband would be ordered to be taken off the file (c).

If the impossibility of obtaining a joint answer arise not from the refusal of the wife, but from the lunacy of the husband, as order for the wife to answer separately will be made upon a like application of the plaintiff (d). In such a case, however, as well as in other cases where it appears to the Court that the defendant is a person of weak or unsound mind, not found such by inquisi-

⁽y) Dubois v. Hole, 2 Ver. 613; (z) Gee v. Cottle, 3 M. & C. 190.
(a) Barry v. Cave, 3 Mad. 472.

⁽b) Barry v. Cave, 3 Mad. 472; Paris v. A'Court, 1 Dick. 13.

⁽c) Gee v. Cottle, 3 M. & C. 180. (d) Estcourt v. Ewington, 9 Sim.

A feme covert defendant may be attached for not answering. Kipp. Hanna, 2 Bland, 26.
 See Leavitt v. Cruger, 1 Paige, 422, cited ante, 455.

tion, the Court may, upon the application of the plaintiff, appoint In Cases of one of the solicitors of the Court guardian of the defendant, by whom he may appear to and answer the bill (e) (1).

It now remains to be considered in what manner the Orders of Defendant the Court, and the rules of the stat. 1 Will. IV. c. 36, provide for unable to ana defendant really unable from poverty to put in an answer, and erty. prevent a party under such circumstances being uselessly detained in custody.

For this purpose, the 75th Order of May, 1845, directs, that if Reference to a defendant upon being brought up in castody for want of his an- quire whether swer, shall make oath in Court that he is unable by reason of he is so. poverty, to employ a solicitor to put in his answer, the Court is thereupon to refer it to the Master to inquire into the truth of that allegation, and to report thereon to the Court forthwith, and the Court may appoint a solicitor to conduct such inquiry on the behalf of such defendant; and if the Master reports such defendant to be unable by reason of poverty to employ a solicitor to put in his answer, the Court may assign a solicitor and counsel for such defendant, to enable him to put in his answer.

By the eighth rule of the Act, the Master to whom the case of Masters to exany prisoner is referred, is empowered to examine the prisoner, amine defendant upon and all other persons whom he may think proper to examine, upon oath. oath; and he may also cause any officer, clerks or ministers of any Courts of Law or Equity, to produce before him, upon oath, any records, orders, books, papers or other writings, belonging to the Courts.

It is also to be observed, that, by the 14th rule, it is provided Defendant that where a defendant is in custody for a contempt in not appear- may borrow an ing, and shall be able to put in his answer by borrowing or ob-the bill taining a copy of the bill, without taking an office copy of the bill, he shall not be compellable to take any such copy, but the clerk in Court may (if he think the defendant is of sufficient ability to pay for an office copy) require him to make an affidavit denying his ability, in consequence of poverty, to pay for an office copy of the bill.

(e) 32nd Order, 1845.

Where a lunatic has appeared by committee, the practice to compel an answer by the committee is the same as in case of other persons. 1 Hoff. Ch. Pr. 189.

⁽¹⁾ A female defendant, unmarried, shove sixty years of age, who had been deaf and dumb from her infancy, was admitted to appear and defend by guardian. Markle v. Markle, 4 John. Ch. 168.

In Cases of Poverty. The 75th Order of May, 1845, is nearly in the same terms as the sixth rule of the Act, but it clears away a difficulty which occurred under the Act, in proceeding before the Master where the defendant was either unable or refused to bring in any statement concerning his poverty, in such a case it was determined that the Master ought not to proceed ex parte; and in one case (g) it was ordered that the Warden of the Fleet should produce the defendant before the Master, at such a time and place as he should appoint, and that the inquiry should be proceeded with in his presence. The Order however now provides, that the Court may appoint a solicitor to conduct the inquiry before the Master. The New Order, moreover, applies to all cases where the defendant is brought up in custody, whereas the language of the Act leads to the inference, that it applied only when the defendant was brought up by habeas corpus.

By 7th rule one of the Masters to visit the prison four times ayear,

The Act having, by the preceding rules, obliged a plaintiff to bring a defendant to the bar within a certain period after his arrest, and provided against the defendant being detained in custody, where the only reason for his non-compliance with the rules of the Court is his poverty, by furnishing him with the means of putting in his answer, and of defraying the costs of his contempt, goes on to prevent the possibility of any prisoner being suffered in future to remain in neglected imprisonment by directing, in the seventh rule, that on the 30th days of the months of January, April, July, and October, in every year, (or if any of those days should happen on a Sunday, then on the following day,) one of the Masters of the Court of Chancery, to be named by the Court, shall visit the prison, and examine the prisoners confined there for contempt, and shall report his opinion on their respective cases to the Court; and that thereupon it shall be lawful for the Court to order, if it shall see fit, that the costs of the contempt of any such prisoner shall be paid out of the interest and dividends arising from the several Government or Parliamentary securities, standing in the name of the Accountant-general of the said Court of Chancery, to the account, intituled "Account of the Monies placed out for the benefit and better security of the Suitors of the High Court of Chancery," and " Account of Securities purchased with Surplus Interest arising from Securities, carried to an account of Monies placed out for the benefit and better security of the Suitors of the High Court of Chancery," or out of any cash standing to either of such accounts, or to any other account which is now

and to report his opinion upon the cases to the Court.

⁽g) Atkinson v. Flint, 5 Sim. 77; Williams v. Parkinson, 5 Sim. 74.

or hereafter may be standing to the credit of the suitors of the said In Cases of Court of Chancery (after and subject to the payment of all charges which by any Act heretofore passed are directed to be paid Court may thereout), and to assign a solicitor and counsel to such prisoner, for order the conputting in his answer and defending him in forma pauperis, and tempt to be to direct any such prisoner, having previously done such acts as paid out of the to direct any such prisoner, having previously done such acts as suitors' fund; the Court shall direct, to be discharged out of custody; provided and assign a that if any such defendant become entitled to any funds out of counsel and such cause, the same shall be applied, under the direction of the solicitor to put in answer. said Court, in the first instance to the reimbursement of the Suitors' fund suitor's fund.

It is to be observed, that applications to the Court under this Application to rule must be made to the Lord Chancellor.

It is also to be observed, that the seventh rule is entirely fram-Lord Chancel-lor. ed for the relief of defendants, and that the Lord Chancellor has Not by plainno authority to make an order under that rule on the application tiff. of the plaintiff. The course is, that the Master shall visit and make his report, and the Court is then authorized to direct payment of the costs of the contempt out of the suitor's fund, and on the contempt being cleared, the defendant is entitled to apply for his discharge (h).

The provisions of the eighth rule, as to the examination of the Production of prisoner and other persons under oath, and the production of re-records, pacords, orders, books, papers and writings belonging to any other Court, applies as well to cases where the Master shall visit the Fleet, under the last mentioned rule, as to those which are specially referred to him. And, by the ninth rule, it is provided, that Where prisonwhen it shall appear to the satisfaction of the Court that any priser is idiot or lunatic, &c. oner is an idiot, lunatic, or of unsound mind, the Court shall appoint a guardian to put in his answer and discharge the defendant, providing for the costs in any of the ways pointed out by the Act as shall seem just; and that if the Court shall see fit, the defence may be made in forma pauperis.

The above rules provide against the possibility of a defendant Where prisonbeing detained in custody in consequence of his not being able, er is obstinate. by reason of poverty, or of insanity or imbecility of mind, to put in what cases in his answer in the ordinary way. But it frequently happens, enter appearthat a defendant is obstinate, and refuses either to appear or to ance or put in put in his answer, although he has not the excuse of poverty or fendant in perwant of intellect to justify his refusal. In such cases the Act fur-son; nishes the plaintiff with the means of obtaining justice, by authoriz-

to be reim-

be made to

⁽A) Watkin v. Parker, 1 M. & C. 370; Garrod v. Holden, 4 Beav 245. 47 VOL. I.

er is obstinate. or proceed to take the bill pro confesso.

Where Prison- ing him to enter an appearance for the defendant, or to put in an answer for him, or by proceeding to take the bill pro confesso against him. The mode in which these objects are to be accomplished under the Act, will be pointed out in the next Chapter.

#### SECTION III.

# Of the Effect of a Contempt upon the Proceedings in the Cause.

Party in contempt cannot make any ap-Court.

Besides the personal and pecuniary inconvenience to which a party subjects himself by a contempt of the ordinary process of plication to the the Court, he places himself in this further predicament, viz., that of not being in a situation to be heard in any application which he may be desirous of making to the Court (1).

Lord Chief Baron Gilbert lays it down, that "upon this head it is to be observed, as a general rule, that the contemnor, who is in contempt, is never to be heard, by motion or otherwise, till he has cleared his contempt, and paid the costs: as, for example, if he comes to move for any thing, or desires any favor of the Court, if the other side says or insists that he is in contempt, though it is but an attachment for want of an answer, he is not entitled to be heard till he hath paid the costs (however small they are); he must first pay them to the party or his clerk in Court, and produce a receipt for them in open Court, before he can be heard; and this is always allowed as good cause against hearing of the contemnor in any case whatsoever " (i). Upon this principle, it

(i) Gilb. For. Rom. 102. Vide acc. Vowles v. Young, 9 Ves. 173.

⁽¹⁾ Where a party is in contempt, the Court will not grant an application in his favor, which is not a matter of strict right, until he has purged his contempt. Johnson v. Pinney, 1 Paige, 466; Rogers v. Paterson, 4 Paige, 450.

He will not be allowed to contradict the allegations in the bill, or bring forward any defence, or allege any new fact. Mussina v. Bartlett, & Porter,

Nor is he allowed to appear and contest the plaintiff's demand, before the clerk and Master, to whom the bill may be referred to take an account; but the inhibition can at any time be removed by filing a full and complete asswer. Mussina v. Bartlett, 8 Porter, 277. See Rutherford v. Metcalf, 5 Hayw. 58.

A defendant against whom there is prima facis evidence of being guilty of a breach of an injunction, cannot be heard upon a motion to discharge a ne exeat against him in the same cause, until he has purged himself of the

A party in contempt may move by counsel to set aside the order against him; for every other purpose he must appear in vinculis. Odell s. Hart, 1 Moll. 492.

is held that where defendants are in contempt for want of an an- Contemnor swer, and an injunction has been granted till answer, they cannot, applying to the before the answer is put in, be in a situation to make any application to the Court, either to cut down or to dissolve the injunction (k). And so in Lord Wenman v. Osbaldiston (1), where a defendant, being in contempt for not putting in his examination pursuant to an order, in order to avoid a sequestration, moved the Court that upon his undertaking to pay in a week's time what should appear to be due to the plaintiff, all further process of contempt should be stayed, the Court declined making any order upon the motion, but directed the appellant to clear his contempt, and then move. And this determination of the Court was affirmed by the House of Lords upon appeal.

In like manner it has been held, that a mortgagee, defendant to Cannot move a bill of foreclosure, who is in contempt, cannot move, under the for a reference 7 Geo. III. c. 20, for a reference to the Master to take an ac- III. c. 20, in count of the principal, interest, &cc. due upon the mortgage (m). case of fore-And so where a party in contempt had applied for and obtained closure; the costs of an abandoned motion under Lord Eldon's order, the the costs of an V. C. of England, upon motion, discharged the order (n).

abandoned mo-

Rule applies

It is to be observed, however, that the rule, that a party cannot roam move till he has cleared his contempt, is confined to proceedings only to proin the same cause, and that a party in contempt for non-obedience ceedings in the to an order in one cause will not be, thereby, prevented from same cause; making an application to the Court in another cause relating to a distinct matter, although the parties to such other cause may be the same (o); and to such an extent has this privilege been carried, as to allow a defendant to move in a cause in which he was not in contempt, to stay proceedings in a cause in which he was in contempt (p) (1).

And although it is the general rule of the Court that parties and does not must clear their contempt before they can be heard, yet the rule prevent party must not be understood as preventing their making application to discharge the the Court to discharge the order, by their non-obedience to which order upon their contempt has been incurred, on the ground of irregularity. which he is in their contempt for

irregularity;

(k) M'Cullum v. Beale, 10 Pri. 130.

(n) Ellis v. Walmsley, Law J. 1835, 60.

(l) 2 Bro. P. C. 276; 2 Eq. C. Ab. 222, p. 1. (m) Hewitt v. M'Cartney, 13 Ves. 560.

(o) Clark v. Dew, 1 R. & M. 103. (p) Turner v. Dorgan, 12 Sim.

⁽¹⁾ A defendant's being in contempt to the first process of the Court, is not a contempt to the decree, and forms no objection to his pleading to a scire facias brought to review that decree. Lane v. Ellzey, 4 Hen. & Munf. 504.

Party from being heard. but he must not mix up other matters with his appli-

In preventing Therefore, where a defendant in custody for a contempt in not obeying an order to pay in money, applied to the Court to discharge him out of custody, on the ground of irregularity in the order (it having been made pending an abatement of the suit), he was not only heard, but the order for his discharge was made, though, under the circumstances, without costs (q). In such cases, it is to be observed, that in making his application, the party in contempt ought to confine his motion to the object of getting rid of the order of which he complains, and that if he embraces other matters in his notice, he will not be allowed to go into such other matters till he has shown that the order, upon which his contempt has been incurred, was irregular. Upon this principle, as the defendant in the above case, in his application to the Court to discharge the order upon which his contempt was incurred, included in his notice of motion the discharge of several subsequent orders upon which he had likewise incurred further contempts, Lord Cottenham was of opinion that he ought, in the first instance, to be confined to that part of his notice of motion which asked the discharge of the order upon which his first contempt was incurred, and upon his failure in inducing the Court to discharge that order, his Lordship refused to hear the residue of the motion (r).

Party in contempt may be heard in oppocial application against him.

- may move to discharge an order by way of appeal.

Contempt not incurred till writ sealed.

It is also to be observed, that the circumstance of a party being in contempt, will not prevent his being heard in opposition to any sition to a spe- special application which the other side may make, upon notice duly served upon him. And where a plaintiff had obtained, from the V. C. of England, an order against a defendant who was in contempt for payment of a sum of money into Court, the Lord Chancellor allowed him to move to discharge that order, on the ground that it was a rehearing of the original application (s). So also, where there is any alleged irregularity in the prosecution of the decree or order obtained under the contempt, a party in contempt may be heard to obtain redress (t).

Although a defendant not appearing or answering within the regular time, is frequently said to be in contempt, yet it does not seem that the contempt is actually incurred, until the writ enforcing obedience to the orders of the Court has been sealed. after the regular time for answering has expired, provided no attachment has issued against the defendant, he may file a joint

⁽r) Wilson v. Metcalfe, MSS. (s) Parker v. Dawson, Law Jour. Wilson v. Bates, 3 M. & C. 201. (t) King v. Dawson, Law Jour.

demurrer and answer (u), which, had process actually commenced, Proceedings might have been taken off the file for irregularity (z).

With respect to the right of the defendant to plead to a bill, Whether a deafter he is in contempt for want of answer, it is to be observed, fendant in confendant in conf that under the old practice there was a considerable difference tempt for want between the effect of a first attachment and of an attachment with of answer can proclamations upon the subsequent proceedings of the defendant plead. Under the old practice a defendant, after the first attachment returned, might, if he was resident above twenty miles from town, have obtained the ordinary dedimus potestatem or commission to put in his answer, or he might, as in ordinary cases, have pleaded or demurred, provided he did so within the usual time, without special leave; but by an order of Lord Clarendon, it was ordered that after a contempt duly prosecuted to an attachment with proclamation, returned, no commission to answer should be made out, nor any plea or demurrer admitted (y), but upon motion in Court and affidavit made of the party's inability to travel, or other good matter to satisfy the Court touching that delay; and the reason assigned by Lord Chief Baron Gilbert for this distinction is, "Because upon the first contempt on the first attachment it did not appear to be an affected delay, and therefore upon tendering the costs of the attachment the defendant might take his commission, and upon like tender the plea or demurrer is to be received; but if there regularly issued an attachment with proclamations, the defendant could not of course purge his contempt by a mere tender, but he must apply to the Court to show that his plea or demurrer is proper, and to exhibit a proper excuse for his delay, in order that the Court might see that there was no further likelihood of delay by the plea or demurrer put in or by the commission to answer granted " (z).

The writ of attachment with proclamations has in all cases been Practice as to abolished (a); but it does not appear that there is any thing to putting in plea affect the old practice with respect to the common writ of attach-commission to ment, and consequently, it may be presumed, that after an attach- take answer. ment issued, a defendant may plead, answer, or demur, not de-

upon Right to Plead.

⁽u) East India Company v. Henchman, 3 Bro. Cha. Ca. 372; Sowerby v. Warder, 2 Cox, 268.

⁽z) Curzon v. De la Zouch, 1 Sw.

^{185.} 

⁽y) Lloyd v. Gunter, 1 Vern. 275; Newton v. Dent, 1 Dick. 234; Sanders v. Murney, 1 S. & S. 225.

⁽z) Gilb. For. Rom. 71.

⁽a) 6th Order, August, 1841.

⁽¹⁾ While a defendant is in contempt, no plea or demurrer can be admitted but upon motion in open Court. Lane v. Ellzey, 4 Hen. & Munf. 504.

Proceedings murring alone, upon tender of the payment of the costs of his conupon Right to tempt (b). Plead.

It seems that a party in contempt can apply for the purpose of As to applying removing scandal from the records of the Court, and consequently, although he cannot except to the plaintiff's bill for impertinence (1), yet exceptions upon the ground of scandal will be allowed (c). It was decided by Lord Cottenham, in Wilson v. Bates (d), that a plaintiff in contempt is not precluded from availing himself of the ordinary process to enforce an answer, although it appears that the fact of his being in contempt may be made the ground of a special application by the defendant to stay proceedings in the cause, until such contempt has been cleared. And in general, whenever a party in contempt is entitled to be heard, there exists a right of appeal, and application may be made with immediate reference to the motion upon which he is so privileged to be heard, or for the purpose of obtaining evidence in support of it (e).

May avail himself of ordinary process.

### SECTION IV.

In what manner Contempts in Process may be cleared, waived or discharged (2).

Contempts may be cleared by performing the act, and paying the costs.

An ordinary contempt in process, as it is a matter merely between the parties, may be declared by the contemnor doing the act, by the non-performance of which the contempt was incurred, and paying to the other party the costs he has occasioned by his contumacy.

Where process has not been executed

Where process has been issued against a defendant in contempt for want of appearance or answer, but has not been executed, the defendant should enter his appearance or put in his answer, and pay or tender to the plaintiff's solicitor the costs of the contempt, if the amount of such costs can be liquidated, as in the cases of

(b) As to whether an order for time to answer confers on the defendant a right to plead; see the cases of Kay v. Marshall, 1 Keen, 196; and Brooks v. Purton, 1 Y. & C. 278.

(c) Anon. 4 Ves. 656 [Sumner's ed. notes]; Everett v. Prythergh,12 Sim.

363; [Aychbourn Ch. Pr. (Londed. 1844) 197, 198; 1 Smith Ch. Pr. (2nd Am. ed.) 569, 570.] (d) 3 M. & C. 204; see also Bickford v. Skewes, 10 Sim. 193.

(e) Cattell v. Simons, 5 Beav. 396.

⁽¹⁾ Howard v. Newman, 1 Moll. 221. (2) See Lowe v. Blake, 3 Desaus. 269; Snelling v. Watrous, 2 Paige, 314.

an attachment. If the amount of the costs cannot be ascertained, as in cases where the defendant has been brought up by the messenger, kabeas corpus, or Serjeant-at-arms, or upon a sequestra- Tender of tion, he should tender such a sum as will cover their probable costs, where amount (f).

Contempt. ascertained.

Of clearing

If the plaintiff's solicitor accept the costs so tendered, it will be If costs acat the plaintiff's own risk if he afterwards puts the process into der necessary. execution. If the solicitor refuse to accept the costs when tendered, it is necessary, in order that the defendant may be discharged Secus, if not from his contempt, that he should obtain an order for that purpose, otherwise the contempt will continue. An order of this nature is made as of course upon the certificate of the Clerk of Records and Writs of defendant's appearance or answer, and upon proof of the tender of the plaintiff's costs of the contempt (g).

Where the process has been carried into effect, and the defendant is in actual custody, he cannot be discharged without an cuted. order, to be obtained in a similar manner either upon motion or petition.

It would appear moreover, that strictly in all cases of contempt, (except where the plaintiff is willing to accept the answer and the costs tendered,) the defendant ought before answering to obtain an order for his discharge upon filing an answer and payment of costs, as otherwise the plaintiff may move to have the answer taken off the file for irregularity (h).

It is to be observed, that where process of contempt has been Defendant issued against a defendant for want of an answer, he is entitled to charged upon be discharged from his contempt immediately upon his putting in putting in an answer, and paying or tendering the costs of his contempt (1); and the Court will not detain him in custody till the sufficiency of his answer has been decided upon (i), unless he has already put in three answers which have been reported insufficient. For by the 10th Order of 1828, upon a third answer being reported insuffi- Defendant cient, the defendant shall be examined upon interrogatories to the tained till repoints reported insufficient, and shall stand committed until each port upon sufdefendant shall have perfectly answered such interrogatories. order for the defendant's discharge may be obtained by motion, ex

An ficiency of answer.

⁽f) Broughton v. Martyn, 4 Bro. C. C. 296.

⁽g) Green v. Thomson, 1 S. & S. 121; Gray v. Campbell, 1 R. & M. 323; Edmonson v. Heyton, 2 Y. & C. Exch. Rep.

⁽h) Haynes v. Ball, 5 Beav. 140; [Wilkin v. Nainby, 4 Hare, 473.] (i) Dupont v. Ward, 1 Dick. 133;

Child v. Brabson, 1 Ves. 110; Boehm v. De Tastet, 1 Ves. & B. 324; Gray v. Campbell, 1 R. & M. 523.

⁽¹⁾ See Odell v. Curreen, 1 Jones, 48.

Of clearing Contempt. process may be resumed.

parte, upon production of the certificate of answer filed, and proof of the tender of costs. If, however, the plaintiff takes exceptions If insufficient, to the answer, and the answer is reported insufficient, he will be entitled to resume the process of contempt where it left off (k); and so he will where the defendant submits to answer the exceptions (l). Nor will the acceptance of costs be considered as a waiver of the contempt by the plaintiff, for by the 24th of these Orders, it is provided, "that where a defendant, in contempt for want of answer, obtains upon filing his answer the common order to be discharged as to his contempt, on payment or tender of the costs thereof, or the plaintiff accepts the costs without order, he shall not by such acceptance be compelled, in the event of the answer being insufficient, to recommence the process of contempt against the defendant, but shall be at liberty to take up the process at the point to which he had before proceeded."

Secus, where a defendant has been discharged upon in a full answer.

If a defendant is in custody, and the plaintiff permits him to be discharged on payment of the costs of the contempt, upon his promising to put in an answer, and no answer is put in, the plainpromise to put tiff must proceed by a new attachment, to sanction which a previous order appears to be necessary (m).

Waiver of contempt.

After insufficient answer.

By accepting further answer.

By taking a step in the cause.

But although a plaintiff does not now, by accepting the costs from a defendant upon his putting in an answer, forfeit his right to recommence the process of contempt at the point where it left off; yet if, after answer put in, he accepts the answer, or takes a step in the cause, he waives the contempt, and cannot renew the process or take any other advantage of it. Thus, if a plaintiff reply to the answer (n), or move upon an admission contained in it (o), he waives the contempt; and so where a messenger had been ordered upon a cepi corpus, and in the mean time the defendant filed his answer, which the plaintiff accepted, and then applied for his costs by motion, it was held that the acceptance of the answer precluded him from his right to costs (p). And so where a defendant who was in contempt put in an answer without paying or tendering the costs, and the plaintiff replied to the answer, but did not proceed with the cause for three terms, whereupon the defendant moved to dismiss the bill for want of prosecution; upon

- (k) Anon. 2 P. Wms. 481; ibid. Wallop v. Brown, 4 Bro. C. C. 212 [Perkins's ed. note (1); S. C. ib. 223 and note]; Bromfield v. Chichester, 1 Dick. 379; Bailey v. Bailey, 11 Ves. 151; Boehm v. De Tastet, 1 V. & B. 324; Coulson v. Graham, 1 V. & B. 331.
- (l) Waters v. Taylor, 16 Ves. 417. (m) Anon. 1 Turn. & V. 117. (n) Haynes v. Ball, 5 Beav. 140. (o) Hoskins v. Lloyd, 18. & S. 393.
- (p) Smith v. Blofield, 2 V. & B. 100.

the plaintiff's objecting that the defendant could not make the motion, in consequence of his being still in contempt, Lord Eldon held that the contempt was gone, and that the defendant was in a situation to make the motion (q). The mere fact however of the plaintiff taking an office copy of the answer does not operate as a waiver of the contempt (r) (1).

Waiver.

A question has been raised whether the plaintiff, by accepting Acceptance of the answer, loses his right to the costs of the contempt; Lord further an-Eldon, in such a case, held that by accepting the answer the waiver of right plaintiff had not given up his right to the costs, as costs in the to costs; cause, but had only waived his right to enforce them by means of the process of contempt (s). It is to be observed that it is but they can only as costs in the cause that such costs can afterwards be enforced as costs ed, and that where a defendant in contempt for want of an answer in the cause. had put in three insufficient answers, and pending a reference of the fourth, put in a fifth answer, which was accepted by the plaintiff, upon which a motion was made that the defendant might pay the costs of the contempt, and of the four insufficient answers, Sir T. Plumer, V. C., held that he could not accede to the motion (t).

swer, &c. no

In the case of Livingstone v. Cooke (u), it appears that the V. C. of England decided that a mere order to amend the bill did not operate as a waiver of the contempt, upon the ground that it creates no obstacle to the defendant putting in his answer; it was admitted, however, that an order to amend, and for the defendant to answer the exceptions at the same time, does operate as a waiver of the contempt, as it prevents the defendant from putting in his When, however, the defendant is in custody, it is provided by the 1 Will. IV. c. 36, rule 10, that the Court may upon motion or petition, of which due notice must be given personally

(q) Anon. 15 Ves. 174. (r) Woodward v. Twinaine, 9 Sim. 301.

(s) Anon. 15 Ves. 174; see also Smith v. Blofield, supra.

(t) Const v. Ebers, 1 Mad. 531. In the marginal note of this case it is said that it seems the plaintiff loses his costs. This must be incorrect, as the result of the case is merely that he cannot enforce the costs in question before the hearing, when they

must be considered as costs in the cause. It is stated, however, in a publication upon the practice of the Court, that according to the settled practice in the taxation of costs, the costs of the contempt, even where there is a decree for the plaintiff with costs, will not be allowed him as costs

in the cause. Vide 1 Smith, 131.
(a) 9 Sim. 463; but see Symonds
but Duchess of Cumberland, 2 Cox, 411.

⁽¹⁾ Filing a cross bill against a party, who is in contempt in the original suit, is a waiver of such contempt on the part of the party who files it; and the defendant in the cross suit, by clearing his contempt in that suit, will clear it in both. Best v. Gompertz, 2 Younge & Coll. 582.

Waiver.

to the defendant, authorize the plaintiff to amend his bill, without such amendment operating as a discharge of the contempt, or rendering it necessary to proceed with the process of contempt de novo, but after such amendment the plaintiff may proceed to take the amended bill pro confesso in the same manner as if it had not been amended: Provided that if the defendant desires to answer the amended bill, the Court shall allow him such time as seems just for that purpose, but if he shall not answer within the time limited, the process for taking the bill pro confesso may be resumed and carried on.

It would appear that an order to discharge a defendant in custody for a contempt, upon the plaintiff's amending his bill, where the amendment is not made under the 1 Will. IV. c. 36, may be obtained ex parte, and without payment of costs (x).

Filing a cross of contempt.

It is to be observed that a step taken in the cause must, in orbill no waiver der that it may have the effect of a waiver of contempt, be in the cause itself in which the contempt has been incurred; therefore, where a plaintiff was in contempt for non-payment of some costs, the filing of a cross bill by the defendant was held not to be a waiver of the contempt by the defendant, so as to permit the plaintiff to make a motion in his own cause (y).

Contempt discharged for irregularity, by motion or petition.

Where any of the process of contempt before referred to have been irregularly issued, the defendant should, by motion or petition, apply to the Court to set them aside or discharge them with costs; and we have seen that the circumstance of his being in contempt will not preclude his making such an application (z).

Supported by affidavit.

An application of this nature should be supported by affidavits of the circumstances (to which the plaintiff may, if he pleases, file affidavits in answer), and the Court will frequently decide the matter upon hearing the application and affidavits. The regular course, however, where the Court entertains a doubt upon the subject, is to direct a reference to the Master to inquire into the regularity of the proceeding (a), in order that the question may be formally debated upon exceptions to the Master's report, which, it appears, may be taken for the purpose of obtaining the opinion of the Court upon the propriety of the Master's decision (b).

Reference to the Master.

It seems that where a party is in actual custody, and a refer-

(x) Gray v. Campbell, 1 R. & M. 323; Ball v. Etches, ibid, 324.

(y) Gompertz v. Best, 1 Young & C. 619.

(z) Ante, 555.

(a) James v. Philips, 2 P. Wms. 657; Curron v. De la Zouch, 1 Swanst. 185.

(b) Broomhead v. Smith, 8 Ves. 357.

ence of this nature is directed, the Court has, upon his presenting By Discharge a petition to that effect, permitted him in the mean time to be discharged, upon his giving security to appear and abide the order of the Court (c).

Where defendant is in actu-

It is to be observed that the Court will not permit the regular- al custody. ity of its process to be decided upon by any other tribunal (d), Injunction to and therefore in Frowd v. Lawrence (e), where a defendant who restrain action at law upon had been taken into custody upon an attachment which was irreg-contempts irularly issued, obtained an order to discharge the attachment with regularly iscosts, and afterwards commenced an action against the plaintiff and the sheriff, for false imprisonment, and another action against the plaintiff for maliciously suing out the attachment, Lord Eldon, upon the authority of Bailey v. Devereux (f), and May v. Hook (g), made an order for an injunction to restrain the defendant from proceeding with his actions at Law; his Lordship, however, held that by such an injunction the Court does not intend that the persons concerned in issuing the attachment, are not to make the party satisfaction; but only that it should not be done by an action at Law, because "it is impossible, from the nature of the thing, that they can try the regularity of an attachment in a Court of Law;" his Lordship therefore ordered that the injunction should be without prejudice to any application that the defendant might be advised to make for compensation or for the costs of The same principle was afterwards acted upon by Lord Lyndhurst, ex parte Clarke (h).

It is to be remarked that in Holt v. Holt (i), (where the irregularity in the process had been occasioned by one of the Registrars of the Court not entering the attachment, although he or his agent had received the usual fee for so doing,) the Court ordered the Master to tax the defendant's costs out of pocket, and directed that they should be paid by the plaintiff, who was reported to have been guilty of the irregularity, but that they should be paid over to the plaintiff by the Registrar: after this the Registrar died. and the costs having been taxed at 581., the matter came on again upon petition, when the administratrix of the Registrar offered to pay the amount out of his assets, the Court being of opinion that as the Registrar had received his fee, his omitting to enter the attachment was a breach of contract and not a mere personal neglect; but as the Court would not allow such a matter to be ex-

⁽c) Ibid. (d) Holt v. Holt, 2 P. Wms. 657. (e) 1 J. & W. 655.

⁽f) 1 Vern. 269.

¹ Dick. 619. (g) 1 Dick. 619. (h) 1 M. & K. 563.

⁽i) Ubi supra.

By Discharge for Irregularity.

amined by any other Court in an action, it made an order, is a summary way, for payment, by the administratrix, out of the Registrar's assets, and there being no one in Court to admit assets for her, it was ordered that she should be examined as to assets.

Motion to disfor irregularity must be made before compliance.

If a party wishes to discharge a process for irregularity, he must charge process make his application before he complies with it, otherwise he will be considered as waiving the irregularity (k): thus where a defendant has been taken upon process of contempt for non-appearance, he must not enter his appearance in the ordinary way, otherwise his appearance will cure the defect.

But where for want of appearance, the defendant must enter conditional appearance.

But although a defendant, against whom an attachment has been issued for a contempt by not appearing, must not, if he means to object to the service of a subpæna, put in his appearance in the usual way, he must nevertheless submit himself to the jurisdiction of the Court in such a manner that, if his objection is held invalid, the plaintiff shall not be deprived of the benefit of his process.

The Court, therefore, before the Orders of August, 1841, required the defendant, before moving to discharge the attachment, to enter his appearance with the Registrar, the effect of which was to enable the plaintiff, in case the Court should decide that the process had been regularly issued, to send the Serjeant-at-arms at once, without any intervening proceeding (1); but by the 7th of those Orders, it is provided, that no order should thereafter be made for the Serjeant-at-arms to take the body of a defendant to compel appearance. Accordingly, in the case of Price v. Webb (m), Sir J. Wigram, V. C., directed that the order for liberty to enter the conditional appearance, should be made upon the consent of the defendant to submit to any process, which the Court might direct to be issued against him for want of appearance, in case the subpœna should not be set aside for irregularity.

Appearance will not cure defect in writ or former process.

It is to be observed that a subsequent appearance by a party cannot be construed to have a relation back, so as to bring him into contempt for disobeying a writ or other process issued before his waiver of the informality had made the process valid against him; and therefore where an attachment was issued against a defendant for non-appearance to a subpæna which had been issued against him, and in which he was described in a wrong name, it was held by the Court of Exchequer that his appearance for the purpose of discharging the attachment would not relate back so

⁽k) Anon. 3 Atk. 567; Floyd v. (1) Davidson v. Marchioses of Hastings, 2 Keen, 309. (m) 2 Hare, 511. Nangle, 3 Atk. 569; Bound v. Wells, 3 Mad. 434; Robinson v. Nash, 1 Anst. 76.

as to cure the defect in the subporna, and bring him into contempt Discharge of, for not appearing in time (n).

It should be noticed also that the principle of waiver applies Compliance only to an irregular and not to an erroneous order, and therefore will only waive the obwhere an order had been made that service of a subpæna upon the jection to an attorney should be good service, and the subposna was accordingly irregular order. served, upon which the attorney entered an appearance; but it Secus, to an was found, afterwards, that the affidavit upon which the order for erroneous orsubstituted service had been made was insufficient, whereupon the der. defendant moved to set aside that order and all the subsequent proceedings, Sir J. Leach, V. C., made the order, on the ground that the original order was erroneous and not irregular, and that being erroneous the defect was not cured by the subsequent appearance of the party to the subpœna (o).

### SECTION V.

# Process by Service of a Traversing Note.

HAVING considered the various means which the practice of the Court affords, for the purpose of compelling an answer from the defendant, it remains to state particular cases in which the plaintiff may himself, if he thinks fit, put in a certain form of answer for a defaulting defendant.

By the 1 Will. IV. c. 36, rule 11, it is enacted, "That in every 1 Will. IV. c. case where the defendant has been brought to the bar of the Court 36, rule 11. to answer his contempt for not answering, and shall refuse or neglect within the next twenty-one days, the plaintiff shall be at liberty, with the leave of the Court, upon ten days' previous notice to the defendant, after the expiration of such twenty-one days, unless good cause can be shown to the contrary, instead of proceeding to have the bill taken pro confesso, to put in such an answer to the bill as hereinafter is mentioned in the name of the defendant, without oath or signature; and thereupon the suit shall proceed in the same manner, as if such answer were really the answer of the defendant, with which the plaintiff was satisfied, and the costs of the contempt, and of putting in such answer, may be provided for in like manner as if the defendant himself had put in

⁽n) Robinson v. Nash, 1 Anst. 76. (o) Levi v. Ward, 1 S. & S. 334. **4**8 VOL. I.

Under Orders, such answer, and such answer, besides the formal parts thereof, shall be to the following effect: -

> "That the defendant leaves the plaintiff to make such proofs of the several matters in the bill alleged, as he shall be able, or shall be advised, and submits his interests to the Court."

> The practice under this rule is not of so much importance as it was formerly, because the plaintiff has now a remedy of a similar kind, though more generally applicable under the Orders of May, 1845, by the 62nd of which, it is provided, that after the expiration of the time allowed to a defendant to plead, answer, or demur (not demurring alone) to any original or supplemental bill, or bill amended before answer, if such defendant has filed no plea, answer, or demurrer, the plaintiff may file a note at the Record and Writ Clerk's Office, to the following effect:-

To original bill.

> "The plaintiff intends to proceed with his cause, as if the defendant had filed an answer traversing the case made by the bill."

To amended bill.

And in the case of a bill, amended after answer, upon the like default, he may file a note to the following effect:-

"The plaintiff intends to proceed with his cause as if the defendant had filed an answer, traversing the allegations introduced into the bill by amendment " (p).

After exceptions.

So also, after the expiration of the time allowed to a defendant to put in his further answer to any bill, the plaintiff (if such defendant shall not have put in any further answer) may file a note at the Record and Writ Clerk's Office, to the following effect:-

"The plaintiff intends to proceed with his cause as if the defendant had filed a further answer, traversing the allegations in the bill, whereon the exceptions are founded" (q).

Effect of the note.

These provisions are substituted for the 21st Order of August. 1841, which is now discharged. It may be observed, that the note filed under the last-mentioned Order, had the same effect as if the plaintiff had replied to the answer, and served the subposts to rejoin, whereas under the Orders of 1845, the filing of a treversing note has no such effect, but the 57th of these Orders provides, that when a copy of the traversing note has been duly served, it has the same effect "as if a defendant had filed a full answer or further answer, traversing the whole bill or such purs of the bill as the note relates to, on the day on which the not was filed."

When a traversing note has been filed, a copy thereof must be

(p) 53rd Order, May, 1845.

(q) 54th Order, May, 1845.

served upon the defendant against whom the same is filed, in the Effect of the manner directed for the service of documents not requiring personal service (r). After the service of the copy of such a note, Service of the defendant cannot plead, answer, or demur to a bill, or put in copy. any further answer thereto, without the special leave of the Court; and the cause is to stand in the same situation as if such defendant had filed a full answer or further answer to the bill, on the day on which the note was filed (q).

In the case of Martin v. Norman (r), a question arose concern- For the puring the effect, for the purpose of evidence, of a traversing note, pose of evifiled under the 21st Order of August, 1841; it was contended that such a note operated in the same way as an answer upon oath, and rendered it necessary that all facts put in issue should be proved by the oath of more than one witness. Sir J. Wigram, V. C., however decided, and his decision seems equally applicable to the present Orders, that the traversing note could not be considered as having such an effect, as the Court had not the oath of the defendant to set against the testimony brought forward by the plaintiff.

Neither the present Orders, nor those of 1841, now discharged, make any exception for the case of infants; but in Emery v. Newson (s), the V. C. of England decided that the 21st Order of August, 1841, did not apply to the case of an infant defendant.

Although in general it is not usual at the hearing of a cause to How service of admit affidavits as to any proceedings, yet in the case of Evans v. it proved at the Williams (t), Lord Langdale, M. R., decided that it was necessa- hearing. ry to prove by affidavit the service of a copy of the traversing note upon a defendant who made default at the hearing.

When such a note has once been filed, the plaintiff cannot, without notice to the parties affected by it, obtain an order to take it off the file (u).

The 55th Order of May, 1845, provides, that where a demur- After plea or rer or plea to the whole bill is overruled, the plaintiff, if he does demurrer not require an answer, may immediately file his note in manner directed by Order 52 or 53, as the case may require, and with the same effect, unless the Court upon overruling such demurrer or plea, gives time to the defendant to plead, answer, or demur, and in such case if the defendant files no plea, answer, or demurrer.

(q) 58th Order, May, 1845. (r) 2 Hare, 596.

(t) 6 Beav. 118. (u) Simmons v. Wood, 5 Beav. 390.

(s) 10 Sim. 564.

⁽r) 56th Order, May, 1845; and 19th and 21st Orders, Oct. 1842, see page 512.

Note.

Effect of the within the time so allowed by the Court, the plaintiff, if he does not require an answer, may on the expiration of such time file such note.

Service upon defendant not required to answer.

It has been decided that, as against a defendant served with a subpæna to appear and answer, the plaintiff is not precluded from serving a copy of the traversing note, by the fact that the note inserted at the foot of the bill did not require such defendant to put in any answer, and from whom consequently no answer could have been compelled (x).

(z) Hughes v. Lipscombe, 3 Hare, 341.

### CHAPTER X.

#### OF TAKING BILLS PRO CONFESSO.

### BECTION I. - Preliminary Order.

In the preceding Chapters the reader's attention has been drawn Nature of the to the method which the Court adopts to compel a refractory defendant to obey the writ of subpæna which has issued against him. By means of the process there pointed out, the plaintiff may, if the defendant be not a privileged person, take his body as a security for his obedience, or if he be a privileged person, or manages to keep out of the way so successfully as to avoid an arrest, he may proceed to compel his submission by taking from him the enjoyment of his property and effects till he complies with the requisitions of the writ.

It is obvious, however, that in a Court of Equity, where the nature of the relief to be granted frequently depends upon the discovery to be elicited from a defendant by his answer, the mere taking a party into custody or sequestrating his property, cannot answer the object of doing that justice to the plaintiff, which it is the business of Equity to secure. The Court has, therefore, adopted a method of rendering its process effectual, by treating the defendant's contumacy as an admission of the plaintiff's case (1); it will, therefore, in cases where the whole line of process has been ineffectually employed against the defendant, make an order that the facts of the bill shall be considered as true, and decree against the defendant according to the Equity arising upon the case stated by the plaintiff. This proceeding is termed taking a bill pro confesso.

It seems that this practice is not of very ancient standing, and Not of ancient that the custom formerly was, to put the plaintiff to make proof standing. of the substance of his bill (2), but there is no doubt that the course of taking the bill pro confesso has now for some time been

See post, 577, note.
 See post, 577, note; Rose v. Woodruff, 4 John. Ch. 547, 548.

Proceedings.

Nature of the the established practice of the Court whenever it is necessary to have the decree of the Court against a defendant "who has allowed all the process of the Court to be issued against him without putting in his answer" (a). And this practice has been very materially extended and facilitated by recent Acts of Parliament and Orders of the Court. Considerable difference formerly existed in the practice of taking bills pro confesso in cases where the defendant was in custody, and in those where he was not; but the recent Orders of the Court have so far assimilated the practice in the two cases, that it will be most convenient to state the general rules applicable to all cases in which a bill is taken pro confesso, remarking any peculiarities resulting from the particularities resulting from the particular circumstances in which a defendant may be placed.

> It is now necessary, in all cases in which a decree is intended to be made against a defendant by taking the plaintiff's bill pro confesso, that, previously to the hearing of the cause, an order should be obtained for that purpose, and then that the cause should be regularly set down to be heard(1).

> Before the Orders of May, 1845, it was apparently the practice, where there was but one defendant, and when he was in custody, for the Court to make an order for taking the bill pro confesse upon motion, and then to leave it to the plaintiff to draw up such decree as he could abide by (b). Whether this practice was exclusively confined to cases of the above description, or whether it prevailed also where one of several defendants was in custody, is by no means clear, though no instances occur of its having prevailed when the defendant was not in custody. This practice has now been abolished, for by the 81st Order of May, 1845, "no cause in which an order is made that a bill be taken pro confesse against a defendant is to be heard on the same day on which the order is made, but the cause is to be set down to be heard, and the Court, if it so thinks fit, may appoint a special day for the hearing thereof" (2).

Preliminary order always necessary.

⁽b) Lewis v. Marsh, 2 S. & S. 220; Seagrave v. Edwards, 3 Ves. 372; see Stanley v. Bond, 6 Besv. (a) Hawkins v. Crook, 2 P. Wms.; Johnson v. Desminere, 1 Vern. 223; Gibson v. Scevengton, 1 Vern. 247.

⁽¹⁾ See Pendleton v. Evans, 4 Wash. C. C. 335; Rose v. Woodruff, 4 John. Ch. 547.

An order to take a bill pro confesso, unless the defendant answers it by a day given, cannot be anticipated, and a decree pro confesso passed in anticipation of such day. Fitzhugh v. McPherson, 9 Gill & John. 52.

(2) In Drummond v. Ponder, Craw. & Dix, 624, it was held, that in causes where there is but one defendant, the bill cannot on motion be taken

pro confesso, but must be set down to be heard.

As in all cases it is now necessary, in proceeding to have the bill taken pro confesso, first to obtain an order upon motion for under Statute. that purpose, it will be convenient shortly to recapitulate the preliminaries necessary in the several cases for the purpose of obtaining this order (1).

In the first place, where the defendant is beyond seas, or ab- Against desconded to avoid being served, and it is intended to proceed to has absconded have the bill taken pro confesso without any appearance having without apbeen entered by him, or on his behalf, under the stat. 1 Will. IV. pearance. c. 36, s. 3 (c); the section first points out the affidavit upon which an order may be obtained, directing and appointing the defendant to appear at a certain time; it then proceeds to enact the several steps that have to be taken by the plaintiff for publishing this Order in the "London Gazette," in the parish church of the defendant, and at the Royal Exchange, and it then provides that upon proof made of such publication of such order as aforesaid, the Court being satisfied of the truth thereof, may order the plaintiff's bill to be taken pro confesso, and make such decree thereupon as shall be thought just (2).

The following decisions are upon the 5 Geo. II. c. 25, which is repealed, but as the clauses upon which they were made are reenacted by the 1 Will. IV. c. 36, they are still important.

In Burton v. Mattons (d), Lord Hardwicke expressed his Minister of opinion to be, that if the minister of the parish in which the copy ing order beof the order directing the defendant to appear is directed to ing published, be published, prevents its being so published, as the Act itself dictment. is silent and does not mention any penalty for his disobedience, such minister is indictable for the contempt of the order of the

It was also the opinion of Lord Hardwicke, upon the above Affidavit, if statute, that it was not sufficient to make an affidavit that the upon informaparty making it was informed and believed that the defendants state from withdrew themselves into Ireland to avoid being served with the whom it is received.

(c) See ante, page 515.

(d) 2 Atk. 114; 1 Barn 401, S. C.

⁽¹⁾ It is error to take a bill *pro confesso* against several defendants, when process has been served only upon one. Robertson v. Crawford, 1 A. K.

As to what service of the subposna is necessary before a bill can be taken as confessed, see ante, ch. 8, § 2, p. 498, et seq.; § 3, p. 514, 515 and notes; Sawyer v. Sawyer, 3 Paige, 263; Sullivant v. Weaver, 10 Ohio, 275. (2) See note ante, 515.

Proceeding under Statute.

process of this Court, but that it must be set forth from whom the party deposing received such information (e) (1).

Mode pre-scribed by the Act must be strictly.

It has also been held, that in proceeding to take a bill procesfesso against an absconding party, the mode prescribed by the Act complied with must be strictly complied with; and therefore, when an application was made to take the bill pro confesso, upon the certificate of the Serieant-at-arms that the defendant had absconded, and had so secreted himself that he could not be found, but without the affidavit, required by the statute, of the defendant's absconding in foreign parts to avoid the process of the Court, Lord Thurlow refused the motion (f) (2). It may be observed that the 8th section of the Act requires an affidavit that the defendant had been in the kingdom within two years before the subposna had issued, which the Court cannot dispense with (g).

Where a defendant has not been within jurisdiction within two years.

Act applies to all cases where party goes abroad to avoid process.

It appears that some doubts were formerly entertained, whether this statute applied only to cases where the defendant had never been served at all, or whether it applied to cases where the defendant had been served with a subposna, but afterwards absconded to avoid the subsequent process; but in Mawer v. Mawer (A), Lord Thurlow was of opinion that it extended to every case where the party had avoided any part of the process whatever, though he might have been served with a subpœna, &c. Upon this principle it was held, that although a defendant had appeared to and answered the original bill, yet if he could not be found so as to be served with a subpæna to answer to a bill of revivor, the plaintiff might proceed under the 5 Geo. II. c. 25, to have the bill of revivor taken pro confesso (i).

Of taking bills pro confesso, under 11 Geo. IV. & 1 Will. IV. c. 36.

The method to be pursued in taking a bill pro confesse against a defendant absconding and going beyond seas, under this act, is detailed in the case of Baker v. Keen (k); and was as follows. The bill was filed on the 29th of October, 1832; on the 24th of January, 1833, the plaintiff's counsel obtained an order on motion, (supported by affidavit that the defendant had absconded and gone beyond the seas,) that the defendant should appear to the bill on or before the 1st of March then next. On the 7th of

⁽e) Ibid. (f) Short v. Downer, 2 Coz, 84. (g) Neale v. Morris, 5 Ves. 1; Bishop of Winchester v. Bourn, ib.

⁽A) 1 Cox, 104; 1 Bro. C. C. 368. (i) Henderson v. Meggs, 2 Brs. C. 127; James v. Dore, 1 Diek.

⁽k) 4 Sim. 498.

See Evarts v. Beeker, 8 Paige, 506.
 See note, ante, 515.

March, 1833, it appearing, by production of the London Gazette, How obtained that a copy of the order for the defendant to appear had been in- under Statute. serted therein, and, by affidavit, that the order had been published in the defendant's parish church, and that a copy of it had been posted at the Royal Exchange, according to the directions of the Act, but that the defendant had not appeared (1); an order was made, on motion, that the plaintiff's clerk in Court should attend at the hearing of the cause with the record of the bill, in order to have the same taken pro confesso against the defendant. cause having been set down for hearing, it was ordered, on the 23rd of March, 1833, on motion, to be placed at the head of the paper of causes for the 27th of that month, and that the plaintiff's clerk in Court should then attend with the record. Accordingly. on that day a decree pro confesso was taken.

It has been before observed, that the 31st Order of May, Under orders 1845 (1), applies to the case of a defendant who has absconded; of 1845. and under the same circumstances as those provided for by the Act, enables the Court to order an appearance to be entered for the defendant, on the application of the plaintiff. It is probable that this Order will supersede the practice under the Act, and that hereafter the Court will, in all cases, order an appearance to be entered for a defendant before it proceeds to make an order to take the bill pro confesso.

We next come to the consideration of the case where the de- Where defenfendant, after appearance, makes default in answering (2), and dant has apthe plaintiff causes compulsory process to be issued against him, peared. but fails in obtaining an execution of the attachment.

According to the old practice of the Court a plaintiff, intending Old practice. to take a bill pro confesso against a defendant who had appeared, but who was in contempt for want of an answer, was obliged, before he could do so, to go through the whole line of process which formerly existed. If upon the attachment the sheriff returned non est inventus, such return was followed by an attachment with

(1) Page, 515.

See Christy v. Christy, 6 Paige, 170; note, ante, 515.
 If a defendant, after appearing, will not answer, the bill will be taken pro confesso. Caines v. Fisher, 1 John. Ch. 8.

In New Jersey, a decree pro confesso may be taken at any time, after the time limited for the defendant to plead answer, or demurss, has expired. It may be taken without notice, and of course, unless it appear that some prejudice will thereby accrue to the adverse party. Oakley v. O'Neill, 1 Green Ch. 287.

Against a Defendant making Default after Appearance. proclamations, commission of rebellion, Serjeant-at-arms, and sequestration. Upon the return of the Serjeant-at-arms, " non est inventus," as we have before seen, the writ of sequestration issued; and it was upon the issuing of this writ, and not upon its execution, that the order for taking the bill pro confesso was made; but according to the present practice, immediately upon the return of the sheriff, non est inventus, the plaintiff can obtain either an order for a Serjeant-at-arms (m), or, in the event of his being able to make a particular affidavit, he can at once obtain the writ of sequestration (n); and upon the issuing of the writ he is. by the old practice, entitled to the order to have his bill taken pro confesso.

Under orders of 1845.

It seems, however, that a plaintiff will not hereafter be compelled to resort even to this curtailed process, in order to obtain an order to have his bill taken pro confesso against a defaulting defendant, who is not in custody, as a much more simple course is provided for him by the 77th and following Orders of May. 1845; upon reference to which (o), it will appear that if due diligence has been used in procuring process to be executed against the defendant, the plaintiff may, upon notice to the defendant or his solicitor, if the defendant has appeared; or upon publication of the notice of motion, in manner therein specified, if the defendant has not himself appeared, obtain an order to have the bill taken pro confesso.

Upon insufficient answer.

Upon answer by husband alone.

Notwithstanding at one time there seems to have been some doubt upon the subject (p), it is now clearly settled that, for the purpose of having the bill taken pro confesso, an insufficient answer is treated as no answer, and that the whole bill is taken pro confesse, in the same manner as it is where no answer at all has been put in (q) (1). And so also where a husband and wife were defendants, and the husband puts in an answer without his wife joining in it, without an order to warrant such a proceeding, the Court treats the answer as a nullity, and will make an order for taking

⁽m) 6th Order, August, 1841. (p) Hawkins v. Crooke, 2 P. Wms. 556; 2 Eq. Cas. Ab. 178. (n) See ante, page 521; 9th Order, August, 1841. (4) Davis v. Davis, 2 Atk. 22. (n) See ante, page 545.

⁽¹⁾ Dangerfield v. Claiborne, 3 Hen. & Munf. 17; Caines v. Fisher, 1 John. Ch. 8; Clason v. Morris, 10 John. 524; Buckingham v. Peddicord, 2 Bland, 447; Mayer v. Tyson. 1 Bland, 560.

A bill answered in part only may be taken as confessed in other parts not answered. Weaver v. Livingston, Hopk. 493; Pegg v. Davis, 2 Blackf.

^{184.} 

the bill pro confesso (r) (1). It has likewise been held, that Against Dewhere, after a full answer, a bill has been amended, and the amended bill is not answered, the plaintiff is entitled to an order to have the bill taken pro confesso generally (s) (2); and when an Where amended bill not order was made for the clerk in Court to attend with the re-answered. cord of the bill, in order to have it taken pro confesso, as to the amendments only, Lord Apsley discharged the order, being of opinion, that the original and amended bills were one record, and that the amendments not being answered, the record was not answered.

oustody.

We now come to the consideration of the course to be pursued, in order to take a bill pro confesso against a defendant, who is in actual eastedy for contempt, not putting in an answer to the bill. It has been before shown, that in such cases, it is incumbent upon the plaintiff not to detain the defendant in prison, beyond a certain limited time, without bringing him to the bar of the Court (t); By serving nobut the plaintiff is now enabled to serve a notice of motion upon upon him. defendant to be made on some day, not less than three weeks after the day of such service, that the bill may be taken pro confesso against him (x).

tice of motion

When the defendant is brought to the bar of the Court, he is committed to the Queen's Prison, and then the plaintiff may sue out a writ of habeus corpus, in manner before stated, upon the return of which, an order to have the bill taken pro confesso, may be obtained.

We have before seen (x), that a sequestration is the first com- Against peers. pulsory process which issues against a peer or member of parliament; and upon the order for the issuing of the writ being made absolute, then by the original practice of the Court, an order to have the bill taken pro confesso may be obtained.

In the case of bills for discovery upon the expiration of the time Where defendants to bills for answering, an order misi to take the bill pro confesso may be for discovery

(r) Bilton v. Bennett, 4 Sim. 17. (s) Jopling v. Stuart, 4 Ves. 619; Bacon v. Griffith, vited ib.

(t) See pages 530 and 539.(u) 76th Order, May, 1845.

(z) See page 547.

⁽¹⁾ Leavitt v. Cruger, 1 Paige, 421. See New York Chem. Co. v. Flowers et ux. 6 Paige, 654.

Where a joint answer by husband and wife is put in, it must be sworn to by both. If not so sworn to, and no valid defence is set up therein, it will, on motion, be taken off the files for irregularity, and the bill be taken as confessed. New York Chem. Co. v. Flowers et ux. 6 Paige, 634. So where an answer is not signed by the defendant, although an answer on oath is waived. Dennison v. Bassford, 7 Paige, 370.

(2) Trust and Fire Ins. Co. v. Jenkins, 8 Paige, 589.

ney-general.

Against Attor- obtained (v) at once upon the defendant entitled to privilege, being in contempt for want of answer, without any order for a writ of sequestration: and this order will be made absolute, unless the defendant shows good cause to the contrary.

Although no compulsory process issues against the Attorneygeneral, we have seen that an order may be obtained for him to put in his answer, within a certain time, or that the bill shall be taken pro confesso.

Husband and wife.

Where a husband and wife are defendants to a bill, the husband is, as we have seen, liable to process for want of a joint answer, (unless he obtains an order to answer separately.) and the bill may be taken pro confesso against him, as against any other defendant (z); where the decree sought to be obtained affects the wife's inheritance, and the husband does not answer, it seems doubtful how far a decree can be had against the wife, for her inheritance (a).

Order not discharged upon mere putting in of answer.

The preliminary order for taking the bill pro confesso, having been obtained by one or other of these means, it remains only to be observed, that the mere putting in an answer by the defendant, will not be a sufficient ground for moving to set it aside; and where upon that ground a motion was made to discharge an order for taking a bill pro confesso, it was refused with costs (b).

accepts answer.

If, however, the plaintiff receives the costs, or accepts the an-When plaintiff swer, (by taking a copy of it or otherwise,) or takes exceptions to it, he will waive the process; the reason of which is, that he cannot, after an answer is actually filed, have a decree pro confesso without, in the first instance, moving to take the answer off the file, which he cannot do after any of the above-mentioned acts (c).

Upon what terms discharged.

But although the mere gratuitously putting in an answer will not be sufficient to discharge the order for taking the bill pre confesso, yet wherever an order of this nature has been made, and the defendant comes in upon any reasonable ground of indulgence, and pays the costs, the Court will attend to his application unless the delay has been extravagantly long (d). It is not, however, a matter of course to discharge the order for taking the bill pro confesso, and the Court, before doing so, will require to see the answer proposed to be put in, in order that it may form a judgment as to the propriety of it, and will not put the plaintiff

(b) Williams v. Thompson, 2 Bro. pra.

C. C. 280; 1 Cox, 413, S. C. (c) Sidgier v. Tyte, 11 Ves. 202. (d) Williams v. Thompson, ubi su-(y) See page 583. Gee v. Cottle, 3 M. & C. 180. Page 198.

to the peril of having just such an answer as the defendant shall think proper to give (e) (1).

When Order discharged or waived.

#### SECTION II.

### Hearing Decree, and Subsequent Proceedings.

THE preliminary order having been obtained, the next subject for investigation is the manner in which the cause is heard, and the decree perfected.

By the 82d Order of May, 1845, it is now provided, that a de- When defenfendant against whom an order to take a bill pro confesso is made, dant waives all is at liberty to appear at the heaving of the course. is at liberty to appear at the hearing of the cause; and if he waives the order. all objection to the order, but not otherwise, he may be heard to argue the case upon the merits, as stated in the bill. At the hearing of the cause, the Clerk of Records and Writs attends in Court with the record of the bill, and the Court, upon reading the record, and taking it to be true (2), will make such decree as seems

(c) Hearne v. Ogilvie, 11 Ves. 77; [Needham v. Needham, 10 Jurist, 81.]

⁽¹⁾ The order taking a bill pro confesso, takes effect from the time when it is pronounced; and the Court will not discharge the order, though the answer is filed before the rising of the Court on the day on which the order is made. James v. Cresswicke, 7 Simons, 143.

On motion to take a bill pro confesso against the guardian ad litem of a lunatic, the order was made on the terms of serving notice on the nearest relations of the lunatic and guardian. Crawford v. Kernaghan, 1 Dru. & Walsh,

⁽²⁾ The bill being taken pro confesso against a defendant does not preclude him from disputing the amount of the plaintiff's demand in the Master's office. Clayton v. Chichester, Craw. & Dix, 64; Pendleton v. Evans, 4 Wash. C. C. 391.

Where a bill is taken pro confesso, the plaintiff is not bound to prove the contract stated in the bill, Douglass v. Evans, 1 Tenn. 18. It is an implied admission of the allegations in the bill, and the Court may decree thereupon. Baltzell v. Hall, 1 Litt. 98.

But the neglect of a defendant to answer a bill upon which a decree pro confesso is passed, amounts to an admission only of the allegations in the bill. Robinson v. Townshend, 3 Gill & John. 413.

If the charge in a bill be not stated with sufficient certainty, the plaintiff cannot, even after a decree pro confesso, have a final decree, unless he establish his demand by satisfactory evidence. Pegg v. Davis, 2 Blackf. 281. See Platt v. Judson, 3 Blackf. 237.

So upon a bill taken pro confesso, and an order of reference thereupon to a Master, such allegations of the bill as are distinct and positive are to be taken as true, without proof. But not such as are indefinite. Williams v. Corwin, Hopk. 471; Platt v. Judson, 3 Blackf. 235. But see Singleton v. Gale, 8 Porter, 270; Wilkins v. Wilkins, 4 Porter, 245, where it is said, that before a decree is pronounced on a bill pro confesso, the Court must be

Decree.

cree and no-

tice.

just; but in no case now will the plaintiff be permitted to draw up the decree (f) himself: moreover, by the 83d Order, in the case of any defendant who has appeared at the hearing, and waived all objection to such order, to take the bill pro confesse, or against whom the order has been made after appearance by himself or his own solicitor, or upon notice served on or after the execution of a writ of attachment against him, the decree is to be absolute.

In all cases, a decree founded on a bill taken pro confesso, is to be passed and entered as other decrees (g); and thereupon an office copy of it must (unless the Court dispenses with service Service of de-thereof) be served on the defendant against whom the order to take the bill pro confesso was made, or his solicitor; and in cases where the decree is not absolute, under Order 83, such defendant, or his solicitor, is to be at the same time served with a notice, to the effect, that if such defendant desires permission to answer the plaintiff's bill, and set aside the decree, application for that purpose must be made to the Court within the time specified in the notice. or that such defendant will be absolutely excluded from making any such application (k) (1).

(f) Order 85, May, 1845; [Geary v. Sheridan, 8 Ves. 192; Rose v. Woodruff, 4 John. Ch. 548.]

(g) 85th Order, May, 1845.(k) 86th Order, May, 1845.

satisfied by sufficient evidence, of the justice of the plaintiff's demand. See also Levert v. Redwood, 9 Porter, 80.

In an Anonymous case, 4 Hen. & Munf. 476, it was held, that on a bill taken pro confesso, the plaintiff cannot obtain a final decree without filing his documents, and proving his case. See, however, the quere upon this

point in Coleman v. Lyne, 4 Rand, 454.

In Larkin v. Mann, 2 Paige, 27, it was held, that if a bill be taken pro confesso, the proof of the plaintiff's title may be made before a Master, on reference. But if an issue of fact is joined in the cause, the plaintiff may make the necessary proof and produce the abstract of the conveyances, before the

In Pendleton v. Evans, 4 Wash. C. C. 391, it was held that a bill, being for the balance of an account, taken pro confesso, the amount must be referred to a Master. The decree is always nisi.

Where a bill against heirs does not allege, that any estate has descended, taking it pro confesso will not amount to a confession that any has. Carneal v. Day, 2 Litt. 397.

Where to a bill against resident and non-resident defendants, the resident defendants answer, denying all the equity of the bill, and it is taken pro confesso against the others, without proof, no decree can be taken, even against the latter. Cunningham v. Steele, 1 Litt. 58.

If a bill is taken pro confesso against a defendant, who is absent from the State, he may, under the statute of New York, come in after the decree and answer and defend the suit. Davoue v. Fanning, 4 John. Ch. 199.

A decree is erroneous, if taken against infants, by default, without proof, though there be a guardian ad litem. Massie v. Donaldson, 8 Ohio, 377. See Carneal v. Sthreshley, 1 A. K. Marsh. 471.

(1) Post, 580, note.

If such last-mentioned notice is to be served within the juris- When Decree diction of the Court, the time therein specified for such application to be made by the defendant, is to be three weeks after ser- Within what vice of such notice, but if such notice is to be served out of the time defendant invisdation of the Court and the court is to be served out of the may apply. jurisdiction of the Court, such time is to be specially appointed by the Court on the ex parte application of the plaintiff (i).

By the 84th of the same Orders, in pronouncing the decree, the Court may Court may, either upon the case stated in the bill, or upon that appoint recase, and a petition presented by the plaintiff for the purpose, as direct sequesthe case may require, order a receiver of the real and personal estration, tate of the defendant, against whom the bill has been ordered to and payment. be taken pro confesso, to be appointed with the usual directions. or direct a sequestration of such real and personal estate to be issued, and may (if it appears to be just) direct payment to be made out of such real and personal estate of such sum or sums of money, as at the hearing, or any subsequent stage of the cause, the plaintiff appears to be entitled to; provided that, unless the decree be absolute, such payment is not to be directed without security being given by the plaintiff for restitution, if the Court Upon security afterwards thinks fit to order restitution to be made; but no pro- for restitution. ceeding is to be taken, and no receiver appointed under the decree, nor any sequestrator under any sequestration issued in pursuance thereof, is to take possession of, or in any manner intermeddle with any part of the real or personal estate of a defendant, and no other process is to issue to compel performance of the de- No process cree without leave of the Court, which is to be obtained on motion, without leave. with notice served on such defendant, or his solicitor, unless the Court dispenses with such service (k).

By the 89th Order of May, 1845, any defendant waiving all objection to the Order, to take the bill pro confesso, and submitting to pay such costs, as the Court may direct, may before enrolment of the decree, have the cause reheard, upon the merits stated in the bill; the petition for rehearing being signed by counsel, as other petitions for rehearing. By the 90th Order, in cases where a decree is not absolute under Order 83, the Court may order the same to be made absolute, on the motion of the plaintiff, made,

- 1. After the expiration of three weeks, from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction.
  - (i) 87th Order, May, 1845.
- (k) 88th Order.

When Decree made Absolute

- 2. After the expiration of the time limited by the notice provided for by Order 86, where the decree has been served without the jurisdiction.
- 3. After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof.

And such order may be made either on the first hearing of such motion, or on the expiration of any further time, which the Court may, on the hearing of such motion, allow to the defendant for presenting a petition for leave to answer the bill.

When decree not made absolute, on what terms defendant permitted to answer.

Where the decree is not absolute under Order 83, and has not been made absolute under Order 90, and a defendant has a case upon merits not appearing in the bill, he may apply to the Court by petition, stating such case, and submitting to such terms with respect to costs and otherwise, as the Court may think reasonable, for leave to answer the bill; and the Court being satisfied that such case is proper to be submitted to the judgment of the Court, may, if it thinks fit, and upon such terms as seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the bill (1); and if permission be given to such defendant to answer the bill, leave may be given to file a separate replication to such answer; and issue may be joined, and witnesses examined, and such proceedings had, as if the decree had not been made, and no proceedings against such defendant had been had in the cause (1).

How far rights and liabilities extend to representatives.

And by the 92nd Order, the rights and liabilities of any plaintiff or defendant, under a decree made upon a bill taken pro confesso, extend to the representatives of any deceased plaintiff or defendant, and to any persons or person claiming under any person who was plaintiff or defendant at the time when the decree was pronounced; and with reference to the altered state of parties and any new interests acquired, the Court may, upon motion or petition, served in such manner, and supported by such evidence as, under the circumstances of the case, the Court deems sufficient, permit any party, or the representative of any party, to file such bill or bills, or to adopt such proceedings as the na-

(1) 91st Order, May, 1845.

⁽¹⁾ A defendant, who has suffered the bill to be taken pro confesse, and a decree to be entered by default, may, under the special circumstances of the case, be let into a defence on terms. Relief is a matter of sound discretion. Wooster v. Woodhull, 1 John. Ch. 539; Parker v. Grant, ib. 639. But where in such case there had been gross negligence on the part of the defendant, and a witness of the plaintiff had died, relief was refused. Ib.

ture and circumstances of the case require, for the purpose of Practice under having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree (if not absolute) duly considered, and the rights of the parties duly ascertained and determined.

As the last-mentioned Orders of May, 1845, will hereafter regulate, in nearly all respects, the practice in taking decrees pro confesso, it is not necessary to set forth at length the statutes or orders which were previously in operation. Since however the sections of 1 Will. IV. c. 36, applicable to this subject, are not repealed, cases may possibly still occur under them, and therefore it will be convenient shortly to state their effect,

The 3rd section enables the Court, as soon as a decree has Process by sebeen made against an absconding defendant, to issue process to questration compel the performance of such decree, either by an immediate tion. sequestration, or by causing possession of the estate or effects demanded to be delivered to the plaintiff, or otherwise, as the nature of the case shall require; and it likewise enables the Court, either to order the plaintiff to be paid his demand out of the sequestered estate, (the plaintiff giving security for the restitution,) or if the Plaintiff givplaintiff refuse to give security, then to order that the sequestered ing security. estate, or the estate of which possession has been decreed to be delivered, do remain under the direction of the Court, either by appointing a receiver or otherwise, until an appearance has been entered by the defendant.

The 4th section directs, in a like case, the service of a copy Service of of the decree upon the defendant, if he be in custody or forth-copy of decree. coming before process is taken out to compel performance thereof.

The 5th section provides for service of a copy of the decree Within what upon the defendant, if he shall, within seven years from the time. making of the decree, return or become publicly visible; or if the defendant shall die within the seven years, and before his return, or shall die in custody, before service of a copy of the decree, then, upon his heir or personal representative, according to the circumstances therein set forth.

By section 7, it is enacted, "that if any person so served with Petition for a copy of such decree, shall, within six months after such service, answering or if any person, not being so served, shall, within seven years next after the making such decree, appear in Court, and petition to be heard with respect to the matter of such decree, and shall pay down or give security for payment of such costs, as the Court shall think reasonable in that behalf, the person so petitioning, or his representatives, or any person claiming under him by virtue

1 W. IV. c. 36.

Practice under of any act done before the commencement of the suit, may be permitted to answer the bill exhibited, and issue may be joined, and witnesses on both sides may be examined, and such other proceedings, decree and execution, may be had thereon, as there might have been in case the same party had originally appeared, and the proceedings had then been newly begun, or as if no former decree or proceedings had been in the same cause."

When absolute.

By the 8th section, it is provided, that if any person, against whom such decree shall be made, his heirs, executors or administrators shall not, within seven years next after the making of such decree, appear and petition to have the cause reheard, and pay down, or give security for payment of such costs as the Court shall think reasonable in that behalf, such decree, made as aforesaid, shall stand absolutely confirmed against the person against whom such decree shall be made, his heirs, executors and administrators, and against all persons claiming, or to claim, by, from or under him or any of them, by virtue of any act done or to be done, subsequent to the commencement of such suit; and at the end of such seven years it shall and may be lawful for the Court to make such further order as shall be just and reasonable, according to the circumstances of the case.

It may be observed, that under the statute a decree did not become absolute against a defendant who had absconded, and had never been served with a copy until the expiration of seven years from the date of the decree, whereas, under the 90th Order of May, 1845, the Court may, in the same case, order the decree to become absolute, after the expiration of three years from the date of the decree.

Applied only defendant had absconded.

The provisions of the statute applied only to cases where the to cases where defendant absconded to avoid being served with process, within In all other cases, a the meaning of the third section (n). decree made upon taking a bill pro confesso, was absolute in the first instance, and no day was given for showing cause against it (o).

Orders of May, 1845, apply to all cases,

The Orders of May, 1845, however apply, as we have seen, as well to suits where the defendant absconds, as to other cases where the plaintiff is enabled to have his bill taken pro confess. They introduce as we have seen some peculiarities into the manner of proceeding under a decree obtained by the bill being taken pro confesso, but in all respects, other than those before stated, 2

Ogilvie v. Hearne, 13 Ves 53; (n) Ante, page 514.
(c) Landon v. Ready, 1 S. & S.44; Knight v. Young, 2 V. & B. 134.

decree pro confesso is executed in the same manner as a decree made upon a regular hearing. In the case of King v. Bryant (p), the plaintiff had obtained the ordinary decree in a foreclosure suit, by having his bill taken pro confesso. Thereupon, notwithstanding the defendant was in custody. The plaintiff proceeded to take the accounts before the Master ex parte, and the question arose, whether he was regular in so doing. Lord Cottenham decided that he was not so, observing, "The Court punishes the defendant's default in refusing to answer, by giving to the plaintiff the benefit of a decree upon the bill as confessed; but there the advantage stops: and when the decree is once pronounced, the subsequent duty of the Court and its officers, is to execute the decree in the ordinary way." It may be observed, that in this case the defendant was in custody, and therefore capable of being served. It was said in the argument, that there is a distinction between such a case, and one under the statute for want of appearance, where the defendant has absconded. In the latter case, there being no one whom the plaintiff can serve, all the subsequent proceedings must (q) necessarily be ex parte.

Subsequent Proceedings.

With respect to bills for discovery, the Orders of May, 1845, Bills for disdo not make any distinction between such bills, and bills for re-covery lief (1); but the stat. 1 Will. IV. c. 36, s. 13, gives an additional facility in obtaining the order to take a bill for discovery pro confesso as against a person having privilege of Parliament. For in the case of a bill for relief, no order to take the bill pro confesso can be obtained against a privileged defendant, until the writ of sequestration has issued; but under the 13th section of that act, in the case of a bill for discovery, the Court may, upon the application of the plaintiff, as soon as the time for answering has expired, although no sequestration has issued, order the bill to be taken pro confesso, unless the defendant shall within eight days after being served with such order, show good cause to the With this exception, there does not seem to be any difference between the case of a bill for discovery and one for relief, so far as regards the practice in obtaining an order to take the bill pro confesso; but after the preliminary order is obtained,

(p) 3 M. & C. 191. 1833, there cited; Donicetti v. Latti, (q) Thompson v. Trotter, 10 Dec. 2 Dick. 588.

⁽¹⁾ Where the bill is for relief only, and states sufficient ground, the process for contempt to compel an answer, is not necessary. Caines v. Fisher, 1 John. Ch. 8.

Bills for Discovery.

there does not seem to be any necessity for a further hearing of the cause, unless it is rendered necessary by the 81st Order of May, 1845.

Whether the 1 Will. IV. c. 36, s. 13, applies to bill for relief.

There is a case, of Logan v. Grant (r), before Sir T. Plumer. V. C., by the report of which it would appear, that he considered that the 13th section, just referred to, applied to bills for relief, as well as to those for discovery, and that he made an order to take a bill pro confesso, upon this construction of the Act. In the case before him, a sequestration had issued, so that by the ordinary practice of the Court, independent of the statute, the plaintiff was entitled to have his bill taken pro confesso (s); consequently, there was no occasion for any decision upon the statute. words of the 13th section seem clearly applicable only to bills for discovery; and this is the construction which was put upon them by Lord Eldon (t).

After order evidence.

After the order has been pronounced by the 14th sect. of 1 may be read in Will. IV. c. 36, "the bill, or an examined copy thereof, shall be taken and read in any Court of Law or Equity, as evidence of the facts, and matters, and things therein contained, in the same manner as if such facts, matters, and things, had been admitted to be true, by the answer of the defendant put into such bill (1); and such bill so taken pro confesso, shall be received and taken in evidence of such and the same facts, and on behalf of such and so many persons, as the answer of the defendant to the said bill could and might have been read and received in evidence of, in case such answer had been put in by the defendant thereto, and had admitted the same facts, matters, and circumstances, as in such bill stated and set forth; and in like manner, every other bill of discovery taken pro confesso, under any of the provisions of this Act, shall or may be taken and read in evidence of the facts. and matters, and things therein contained, to the extent aforesaid."

> It may be observed, that this last provision for making the bill evidence, is not confined to privileged defendants, but it applies to all cases where the bill is taken pro confesso under the provisions of the Act; it does not seem that there is any direct order or statute, making a bill taken pro confesso otherwise than under the Act, evidence against the defendant (2).

⁽r) 1 Mad. 626, ex relatione. (s) See page 547.

⁽t) Jones v. Davis, 17 Ves. 368.

⁽¹⁾ See ante, 577, note; Stafford v. Brown, 4 Paige, 360, cited ante, 538, in note.

⁽²⁾ As to authority to appear for a body politic, see the Cape Sable Company's Case, 3 Bland, 606.

# CHAPTER XI.

#### OF THE DEFENCE TO A SUIT.

In the preceding Chapters the attention of the reader has been Course of proprincipally directed to the case on the part of the plaintiff, the ceeding on method of submitting it to the Court, and the means provided by dant. the practice of the Court for compelling the defendant to submit himself to its jurisdiction; or, in case of his refusal, of depriving him of the benefit of his contumacy by giving to the plaintiff the relief to which the justice of his case appears to entitle him. shall now proceed to consider the line of conduct to be pursued by a defendant who is willing to submit himself to the authority of the Court, and to abide its decision upon the matter in litigation.

The first step to be taken by a defendant who intends to defend Employment the suit, after he has been served with the subpoena, is to employ of a solicitor. a solicitor to appear for him. The employment of a solicitor, for that purpose, is not absolutely necessary, as he may choose to defend the suit in person, in which case he must apply immediately to the Clerk of Records and Writs to enter his appearance (a). Special author-It is usual, however, to employ a solicitor; and it is to be observ- ity unnecessaed, that a special authority is not necessary to enable a solicitor to undertake the business, and that he may do so under a general authority to act as solicitor for his client (b); a solicitor, however, ought not to take upon himself to appear for a defendant without some authority, and where one without any instruction had caused an appearance to be entered for an infant defendant, the appearance was ordered to be set aside, and the solicitor to pay the costs (c) (1).

⁽a) See 20th Order, October, 1842, ante, page 352. ge 513. (c) Richards v. Dadley, Rolls Sit-(b) Wright v. Castle, 3 Mer. 12; tings after Trin. Term. 1837.

⁽¹⁾ See Amer. Ins. Co. v. Oakley, 9 Paige, 496.

Different sorts of Defence.

The defendant having appeared to the *subpæna* and taken a copy of the bill, the next point for consideration in the ordinary course of the cause is, the nature of the defence to be put in.

By demurrer or plea.

To whole bill.

Or only to

It will be recollected that by the form of subpæna, the defendants upon whom this writ is served are commanded at a certain day personally to appear before the Court; and to answer concerning such things as shall then and there be alleged against them (d); so that the first thing which a defendant is required to do after appearance, is to answer the bill. It may, however, happen from some cause, either apparent on the face of the bill itself, or capable of being concisely submitted to the Court, that the plaintiff is not entitled to the relief which he has prayed; or if he is entitled to the assistance of the Court, he may not be entitled to relief upon all the points upon which he claims it; in such cases the defendant may, if his objection goes to the whole relief, submit the grounds upon which he considers the plaintiff not entitled to what he seeks, in a concise form to the Court, and pray the judgment of the Court whether he is bound, under the circumstances, to put in any further or other answer to the bill; or, if he objects to part only of the relief, he may answer that portion only of the bill which is material to the relief which he does not object to, and submit to the judgment of the Court whether he is bound to answer the rest. This species of defence, if the objection appears upon the face of the bill itself, is made by dessurrer; but if it depends upon any matter not in the bill, it must be submitted to the Court in the form of a plea. If the defence submitted to the Court in either of the above forms is admitted, or held upon argument to be good, the effect of it, if it be a demurrer, is to put the bill, or, that part of it which has been demurred to, out of Court; or, if it be a plea, to limit the matter in dispute to the question, whether the point raised by it be true or not; in which case, if the defendant succeeds in establishing the point raised by the plea by evidence at the hearing, the bill, so far as it is covered by the plea, will be dismissed. If the demurrer or plea be held upon argument to be bad, the effect of the judgment of the Court, in general, is, that the defendant must put in an answer to the bill; he may, however, if his first defence has been by demurrer, be admitted, under certain circumstances, to dispute the right of the plaintiff to call upon him for an answer, by means of a plea; or he may still submit reasons why he should not be called upon to answer the whole of the bill by demurring or pleading to a portion of it only. If the defendant has no reasons of Different sorts the above nature to offer why he should not be called upon to answer the plaintiff's bill, or if, having offered any such reasons, By answer. they are overruled, the course of the Court requires that he should put in a full answer to the bill, unless, indeed, being a case in which the relief claimed by the plaintiff would, if granted, be beneficial to himself, he thinks proper to relinquish the benefit he might derive from it, which he can do by putting in a species of answer called a disclaimer, by which he disclaims all interest in Or disclaimer. the matters in question in the suit.

In the ensuing Chapter, the several methods of defence above alluded to will be discussed, and the reader's attention will be drawn to the practice relating: 1st, to Demurrers; 2ndly, to Pleas; 3rdly, to Disclaimers; 4thly, to Answers; and lastly, as all or any of the matters above pointed out may, in certain cases, be joined in a defence to one bill, the practice arising from such a combination of defences will be discussed. But before we proceed to the different modes of defence, it will be right to consider the practice of the Court with regard to entering appearances (1).

⁽¹⁾ Story Eq. Pl. § 433, et seq.

# CHAPTER XII.

#### APPEARANCE.

# Section I. — Of Appearance in General.

Object of appearing.

Necessary in all cases.

Except where defendant absconds.

Appearance is the process by which a person against whom a bill has been filed submits himself to the jurisdiction of the Court. And it is generally necessary, in order to give to the Court cognizance of the matter in dispute, that the defendant should appear (1). This rule was adopted from the ancient Civil Law, according to which no decree could be had against an absent person, against whom process has been issued, but who could not be brought in to appear (a); and it was so strictly observed, that, till the stat. 5 Geo. II. c. 25 (b), a decree pro confesso could not be made against a defendant, for whom no appearance had been That statute first empowered the Court, in the case of a defendant absconding to avoid its process, to order the bill to be taken pro confesso, against such defendant, although no appearance had been entered for him; and as its provisions, as we have seen, are still in force under the 1 Will. IV. c. 36, ss. 3, et seq., a bill may still, under that statute, be taken pro confesso against a defendant, without a previous appearance being entered for him, although the Orders of May, 1845, would seem to require that in such cases the plaintiff should first enter an appearance for the defendant (c) (2).

- (a) Gilb. Evid. Rom. 36.
- 1 Will. IV. c. 36, p. 514.
- (b) Repealed and re-enacted by
- (c) Page 623.

⁽¹⁾ A demurrer to the bill, signed by the Attorney-general of a State, is a sufficient appearance by such State, in a suit brought against it. New Jersey v. New York, 6 Peters, 323.

Where a defendant puts in an answer, which is read in Court, by consest of the opposite counsel, and ordered to be filed, and a decretal order is made thereon in favor of the defendants, it is an appearance on the records of the Court. Livingston v. Gibbons, 4 John. Ch. 94

⁽²⁾ Where a defendant is proceeded against as an absentee, he is entitled of course without an affidavit of merits, at any time before a sale under the decree, to come in and make his defence, if he has any, upon payment of

The various circumstances under which the plaintiff is enabled Different sorts to enter an appearance for a defendant have been already stated, of Appearance and need not here be repeated (d).

Appearances are either voluntary or compulsory (e). Voluntary, Different sorts when the defendant comes in upon the return of the subpœna; of appearance compulsory, where the appearance is entered for the defendant, or is the consequence of any process of contempt.

There is also another species of appearance, viz., appearance With registrar. with the Registrar. This formerly differed from the ordinary appearance, which was only entered with the clerk in Court for the party appearing, and communicated by him to the clerk in Court for the plaintiff, in that it was entered upon the records of the Court (g), but now all appearances are extered by the Clerk of Records and Writs, not as the agents of the parties, but as the officer of the Court, consequently it would seem that all appearances are now upon the records of the Court. The practice, however, of entering an appearance with the Registrar will probably continue when the defendant has to enter into any special undertaking upon his appearance.

A defendant may also appear gratis, which takes place where Gratis. he does so before he has been served with a subpœna.

The place at which appearances are entered, as stated in the Place where memorandum at the foot of the writ, is, "at the Record and Writ appearances are entered. Clerk's Office, in Chancery Lane." This memorandum is affixed for the purpose of apprizing the party upon whom the writ is served of the place to which he is to go, in case he is desirous of appearing without the intervention of a solicitor. Usually, however, the defendant, upon being served with the subpæna, employs a solicitor of the Court to take the necessary steps on his behalf (1).

In general, where a husband and wife are served with a sub-By husband poena, a separate appearance by the wife will be irregular; the and wife. husband should appear for both, and if he omits to do so, an at-

(d) See Ch. VIII. secs. 3, 4 & 5. (g) For. Rom. 82. (e) 1 Harr. 112.

such costs as the Court may deem reasonable. Jermain v. Langdon, 8 Paige, 41; Everts v. Beeker, 8 Paige, 506. See ante, 516, note, respecting actice in case of absent defendants, and the mode of taking decrees against them.

⁽¹⁾ The usual mode of appearing in New York, is by entering an appearance with one of the clerks of the Court; but a notice by the defendant's solicitor of an appearance, given to the plaintiff's solicitor, without an entry in the clerk's minutes, would, it seems, be binding on the party. Livingston v. Gibbons, 4 John. Ch. 94.

Different Sorts tachment may go against both (h) (1). And therefore, where a of Appearance. bill was filed against a husband and wife, and the husband only appeared for himself, and put in a demurrer in their joint names, an attachment was issued against both for the non-appearance of And so where a husband is served without the wife, the wife (i). he must, if he have notice that his wife is also a defendant, appear for both; but in that case the attachment will go against him alone (k).

In what cases wife may appear alone.

But although a wife cannot, in general, appear by herself, there are, as we have seen, cases in which the Court will permit a subpæna to be served upon her alone (1).

By infant. By idiots and lunatics.

An infant must appear by his guardian ad litem (1) (2).

Idiots and lunatics also appear by their guardians, who are generally their committees, unless the interests of such committees are adverse, in which case another person must be appointed (m) (3).

### SECTION II.

# Of Voluntary Appearance.

VOLUNTARY appearance is where the defendant, having been served with the subpæna, obeys its injunctions either upon or before the day of its return. We have seen before, that a defendant has now in all cases eight days after the service of the subpœna, within which he must appear (n). The course for a defendant, who intends to appear, is, personally or by his solicitor, to instruct

- (h) Prac. Reg. 37.
- (m) Ante, page 161.
- (i) Cary, 92. (k) Prac. Reg. 37.
- (n) See page 517, and for computation of time, see page 404.
- (l) See ante, page 535.

(1) Where a bill is filed against husband and wife, the husband is bound to enter a joint appearance, and put in a joint answer for both. Leavitt e. Cruger, 1 Paige, 421.

(2) Ante, 203, et seq. and notes. Infants can only appear and answer by

their guardian appointed for that purpose. And, it is erroneous to proceed against them till such appointment. Irons v. Crist, 3 A. K. Marsh. 143; Bradwell v. Weeks, 1 John. Ch. 325.

It is irregular, after appointment of a guardian, for an infant to take the bill pro confesso against him for want of an appearance or of answer. Car-

neal v. Sthreshley, 1 A. K. Marsh, 471.

(3) A party who takes a copy of a bill filed against him as committee of a lunatic, and enters his appearance without his addition of committee, &c. cannot afterwards, after suffering the plaintiff to go on to a final decree, object that the subpana was against him individually, and not as committee, &c.

Brasher v. Cortlandt, 2 John. Ch. 247. See ante, 224, note, 302, notes.

the Record and Writ Clerk, in whose division the cause is, to en- How Effected. ter an appearance for him. These instructions must contain the address for service of the party or solicitor (o).

By the 23d Order of Oct. 1842, when any solicitor or party shall Notice to be cause an appearance to be entered, or an answer, demurrer, plea, given. or replication to be filed, he shall, on the same day, give notice thereof to the solicitor of the adverse party, or to the adverse party bimself, if he acts in person.

When the appearance has been entered, the defendant's solicitor After appearcan procure an office copy of the bill from the Clerk of Records copy of bill and Writ (p).

may be had.

By the 31st Order of Dec. 1833, office copies of bills are to con- How written. tain only one folio, consisting of ninety words, in every page, and to be reckoned, as to schedules, according to the manner directed by the General Order of the 28th Nov. 1743, viz., they are to be written in three columns, the first or outer column and the third or last column whereof are to contain respectively the dates and Howschedules sums in figures, as they are respectively written in the engrossment of such schedules, and the middle columns to contain four words in a line of the facts or matters charged in such accounts or inventories (q).

Every defendant (or set of defendants, where more than one By whom it appears by the same solicitor at the same time) is bound to take must be taken. an office copy of the bill, unless he is a person entitled to the privilege of peerage, and has been served with a copy of the bill at the same time that he was served with the letter missive in the manner before pointed out, in which case he is not obliged to take or pay for any other copy of the bill (r). In the case of Aked v. Aked (s), the V. C. of England held, that the Clerk of Records and Writs is not compellable to file the answer of a defendant who has refused to take an office copy of the bill. The statute 1 Will. IV. c. 36, s. 15, rule 14, also provides, that where a defendant is in custody for a contempt in not appearing, and shall be able to put in his answer by borrowing or obtaining a copy of the bill without taking an office copy, he shall not be compellable to take any such copy; but the Clerk of Records and Writs may, (if he thinks the defendant is of sufficient ability to pay for an office copy,) require him to make an affidavit denying his ability, in consequence of poverty, to pay for an office copy of the bill (t).

⁽o) 17th Order, Oct. 1842, page 496.

⁽p) 3rd Order, Oct. 1842. (q) Beames' Orders, 395.

⁽r) Ante, page 497; Beame's Orders, 395.

⁽s) 11 Sim. 437.

⁽t) Page 552.

To Amended

to amended bills.

With respect to appearances to amended bills, if the amendment is made before answer, and the defendant has appeared to the When appear- original bill, no new appearance is necessary, but the defendant ance necessary has the full period for answering allowed him, from the time when he is served with notice of the amendment (u). amendment is made after answer, the plaintiff, if he requires a further answer, must serve a subpæna (1); in which case an appearance must be entered in the same manner as an appearance to the original bill, within the time limited by the writ.

Of preferring costs.

It is in general irregular to issue a subpæna before the bill is filed; so that if the defendant, after being served with the subpæna, discovers that no bill has been filed, he may, if he pleases, "prefer costs" against the plaintiff; that is, he may as of course obtain a subpæna for the costs incurred, in consequence of his having been improperly served with the subpæna (x).

4 Anne, c. 16.

When bill prays injunction.

But the statute 4 Anne, c. 16, which prohibits a subpæna issuing till after the bill is filed, excepts the cases of bills for injunc-

tions to stay waste, or to stay suits at law commenced (2).

consequence of this exception is, that where the bill prays an injunction, it need not be on the file before the return of the subpæna (y); and as the day of the return does not expire till twelve o'clock at night, after the office is closed, it is considered that the bill is in time if it be on the file at the time of opening the office

the following morning. As moreover it is impossible to ascertain till the bill is filed, whether it pray an injunction or not, the de-

At what time.

fendant should not in any case commence proceedings for costs till the expiration of the day of the return, or till he has discovered that the bill does not pray for an injunction. When he has ob-

tained a subpæna for his costs, if upon service thereof and demand, the plaintiff refuse to pay them, an affidavit of the service, demand, and refusal must be left with the Record and Writ Clerk, who will make out an attachment against the plaintiff (z). After

In what manner.

(u) stanley v. Bond, 6 Beav. 420; (y) Turn. & V. 104.
16th Order, May 1845. (z) Hind. 96; Empringham v.
(z) Salmon v. Turner, 4 Beav. Short, 12 L. J. 144.
528.

⁽¹⁾ Ante, 487.
(2) In New York, no injunction can be issued in any case, until the bill is filed. 2 Rev. Stat. (N. Y.) 179, § 77; 1 Barbour Ch. Pr. 615.

Where an injunction is granted ex parte, upon the filing of the bill, it is irregular for the plaintiff to serve the injunction upon the defendant, without serving him with a subpæns to appear and answer. Patrick s. Harrison, 3 Bro. C. C. (Perkins's ed.) 476 and notes; Parker v. Williams, 4 Paige, 439; Seebor v. Hess, 5 Paige, 85. But such irregularity is waived

the attachment sued out, the plaintiff will not be permitted to file his bill till after the costs have been paid; but if the bill be already on the file, the plaintiff may move to retain it upon pay- Defendant ment to the defendant of costs out of purse (a).

may prefer costs.

Preferring

It is to be observed, that, by preferring costs, the defendant will Practice has not relieve himself from appearing when the bill is filed; and, in become obsolete. fact, so little is gained by the proceeding, that the practice has become obsolete (b), it being generally considered most advantageous for the defendant, when he has been improperly served with a subpæna before the filing of the bill, to wait till the attachment has been issued against him, and then to move to set the process aside for irregularity. The effect of such a proceeding is to oblige Modern practhe plaintiff to sue out and serve a fresh subpœna. The defend-tice where no bill has been ant, however, who intends to avail himself of it must be careful filed. not to appear to the subpœna, which will have the effect of waiving the irregularity; but he must wait till an attachment has been issued, and then move to set it aside, having previously entered his appearance with the Registrar.

It has been before stated, that a defendant may, if he has been What is a grainformed of a bill being filed against him, cause an appearance to tis appearance. be entered for him without waiting to be served with a subpæna; and that such a proceeding is called appearing gratis (1).

This method of appearing is generally resorted to where a plain- In what case. tiff serves some only of the defendants with the subpæna, and a defendant who is not served wishes to make an immediate application to the Court in the cause. Thus where a plaintiff filed his Where defendant wishes to bill against the Master, &c., of Christ's College, Cambridge, mak-refer bill for ing the solicitors parties and served the College with process, but impertinence. did not serve the solicitors; the solicitors appeared gratis, and joined with the College in referring the bill for impertinence; such

(a) Ibid.

(b) Cha. Rep. Appx. B. 25, page 555.

by the defendant voluntarily appearing and answering to the bill. Parker v. Williams, 4 Paige, 439.

⁽¹⁾ Hume v. Babington, 1 Hogan, 8. So where the subpana is irregularly served, as where it is served out of the State; the defendant may voluntarily appear. Dunn v. Dunn, 4 Paige, 425. See Seebor v. Hess, 5 Paige, 85.

Where a plaintiff neglects to serve a subpana on a defendant in a bill against whom an injunction has been granted affecting his rights, such defendant may appear voluntarily and apply to dissolve the injunction, without waiting for the service of the subpana. Waffle v. Vanderheyden, 8 Paige, 45.

Consequences appearance was held to be regular, and a motion to discharge it refused with costs (c).

In Barkley v. Lord Reay (d), Sir J. Wigram, V. C., decided, that a defendant against whom it is prayed that he may be bound by the proceedings in the cause, is entitled to appear gratis, either before or after service.

Where allowed at the hearing.

Not unless defendant named in the bill.

A party may, likewise, in certain cases, appear gratis at the hearing, and consent to be bound by the decree (e). It is to be observed, however, that in such cases it is necessary that the party should be named as a defendant upon the record; and that where a person, not a party to the suit, was interested in a question, and appeared by counsel, and submitted to be bound by the decision, the Court held, that they could not hear him without the consent of the other defendants (f).

In such case it seems, that, if all parties consent, the record may be brought into Court, and the defendant's name inserted in the record (g).

Does not prevent motion for injunction ez parte.

It is to be observed that, by appearing gratis, which is the volumtary act of the defendant, he cannot deprive the plaintiff of his right to move ex parte for an injunction; and, therefore, where a motion was made for an injunction to restrain the cutting of ornamental timber, and the defendant, on the day before the motion was made, entered an appearance gratis, Lord Eldon, nevertheless, granted the injunction, observing, that if a person, about to commit waste, and against whom a bill is filed, could, by appearing the evening before the motion, prevent it, he would get two days for cutting timber (h). His Lordship, however, said, that perhaps it might be different where the defendant has appeared so long before the motion that the plaintiff might have given him notice; and there is no doubt that if a plaintiff serves a defendant with a subpæna, he thereby puts him in a situation which entitles him to notice of the application to be made against him (i).

Unless there has been time to serve notice.

Defendant does not lose his right to · costs.

A defendant, by appearing gratis, does not lose his right to costs; and, therefore, where a defendant, without being served with a subpæna, appeared, and put in a plea and answer, and the plea was allowed, Lord Thurlow held that he was entitled to his costs.

(c) Fell v. Christ's College, 2 Bro. 279.

(d) 2 H. 309.

(g) Ibid.

(k) Aller v. Jones, 15 Ves. 605;

Perry v. Weller, 3 Russ. 519.
(i) Perry v. Weller, ubi supra; such notice, however, must have the previous leave of the Court to same tion it; Hill v. Rimell, 2 M. &. C. 641.

⁽c) Capel v. Butler, 2 S. & S. 45. (f) Bozon v. Bolland, 1 R. & M. 69; Attorney-general v. Pearson, 7 Sim. 290.

We have before seen, that a defendant, notwithstanding an ap- Consequences pearance has been entered for him, may afterwards appear himself in the ordinary way; but such appearance is not to affect any pro- After appearceeding duly taken, or any right acquired by the plaintiff under or ance has been entered for a after the appearance entered by him, or prejudice the plaintiff's defendant. right to be allowed the costs of the first appearance (k). Moreover when a defendant has been served with a copy of the bill, he may appear in the common form at any time within twelve days from the service of the copy of the bill (1). So also, within the same time, the defendant may enter a special appearance under the following form, that is to say, A. B. appears to this bill for the purpose of being served with notice of all proceedings therein; after the expiration of twelve days from the service of the copy of the bill, no defendant can enter either a common or special appearance without first obtaining an order for that purpose (m).

#### SECTION III.

### Compulsory Appearance.

Compulsory appearance is where an appearance is entered by the plaintiff for the defendant, or where the defendant is taken and brought up upon an attachment, and compelled to enter an appearance for himself. Compulsory appearance may therefore be divided into substituted and personal. According to the old practice a defendant brought up in actual custody for default in appearance, was not allowed to enter his appearance in the same manner as a person who appeared voluntarily, but he was obliged to enter his appearance with the Registrar. And it does not seem that the new Orders affect this rule, but as a defendant will not probably hereafter frequently be attached for want of appearance, the rule is of comparatively little importance; all appearances would seem now to be upon the records of the Court, but formerly an appearance with the Registrar was singular in this respect, and Appearance differed from an appearance in the office by a clerk in Court: for with the regisan appearance with the clerk in Court, was only a foundation upon which to issue process; and there was no record of such appearance, (it being merely affected by the defendant's clerk in Court

⁽k) 30th Order, May, 1845. page 493. (1) 26th Order, August, 1841; and 37th Order, May, 1845; and ante, (m) Ante, p. 493. (n) 1 Harr. 112.

In what cases, giving notice to the clerk in Court for the plaintiff, that the defendant appears,) but when a defendant entered his appearance with the Registrar and did not afterwards answer, "it was a departure in despite of the Court, upon which the Court might order an immediate commitment, since this was not merely a contempt of the process, but of the Court itself" (o).

In what cases entered. tempt.

The practice of entering an appearance with the Registrar, besides being the proper mode of appearance where a party who is Ordinary con- brought up or detained in prison is willing to submit himself to the jurisdiction, is also the course to be adopted in all cases where a party being in contempt for non-appearance, pursuant to the subpæna, is desirous of setting aside the process which has been issued against him, either for irregularity in the process, or in the subpæna upon which it is founded, or in the service of that writ (p).

Extraordinary contempt.

In cases also of extraordinary contempt, where the contempt is by beating or abusing the person serving the process of the Court, the party has frequently been ordered to enter his appearance with the Registrar, and to be examined upon interrogatories (q).

Conditions upon which further time now granted.

By the practice previous to the Orders of May, 1845, coming into operation, in every order granted by a Master for further time to answer, it was made a condition that the defendant should enter his appearance with the Registrar, and consent to a Serjeant-atarms, as in the case of a commission of rebellion, returning "non est inventus," unless under special circumstances the Master otherwise directed (s). In this case the order for further time was not available till the consent was given by the defendant, and the condition performed. This order has been discharged by the Orders of May, 1845, and in place of it, the 18th of these Orders provides, that if a defendant using due diligence, is unable to put in his answer to a bill within the time allowed him for that purpose, the Master, on sufficient cause being shown, may allow to such defendant such further time, and on such if any terms, as to the Master seems just.

Form of conditional appearance.

A similar consent to a Serjeant-at-arms was also required where the defendant, in contempt for non-appearance, applied to set aside for irregularity the process which had issued against him.

But the 7th Order of August, 1841, having directed that no order should thereafter be made for a Serjeant-at-arms to take the body of the defendant to compel appearance, an order for liberty

⁽o) For. Rom. 83.

⁽p) Ante, p. 564. (q) Hind. 144.

⁽s) 21st Order, Dec. 1833. (t) Price v. Webb, 2 H. 511

to enter the conditional appearance was made, upon consent of the In what Cases. defendant to submit to any process which the Court might direct to be issued against him for want of appearance, in case the subpæna should not be set aside for irregularity (t). It would seem that an appearance with the Registrar is entered by the defendant's solicitor or by the defendant personally, and that the Registrar writes a certificate of his appearance and of his undertak-

The rule which required that a defendant brought up in custody When defendant admitted should enter his appearance with the Registrar did not apply to a to bail. defendant who had been admitted to bail. Such defendants might have entered their appearance in the ordinary manner. According to the modern practice, when a defendant attached for want of

appearance is admitted to bail, there seems to be no further compulsory process capable of being issued against him; the plaintiff must therefore himself enter an appearance for the defendant (z).

Substituted appearance is when the plaintiff enters an appear-Substituted ance for the defendant; it will be recollected that the Clerk of appearance. Records and Writs is now empowered to enter an appearance for a defendant without a special order of the Court, under the circumstances before stated. The various occasions upon which the plaintiff is enabled to enter appearance for defendants of different descriptions have been before enumerated (y), and need not here be repeated.

(u) Hind. 112 & 145.

(z) See page 530.

(y) See Ch. on Process for Compelling Appearance.

# CHAPTER XIII.

#### DEMURRERS.

## Section. I. — Of the General Nature of Demurrers.

When proper.

WHENEVER any ground of defence is apparent upon the bill itself, either from the matter contained in it, or from defect in its frame or in the case made by it, the proper mode of defence is by demurrer (a)(1).

Origin of term.

A demurrer has been so termed, because the party demurring, demoratur, or will go no further (b) (2); the other party not having shown sufficient matter against him; and it is in substance an allegation by a defendant which, admitting the matters of fact stated by the bill to be true, shows that as they are therein set forth, they are insufficient for the plaintiff to proceed upon, or to oblige the defendant to answer (c); or that, for some reason ap-

Nature of defence by.

> (a) Ld. R. 107. (b) 3 Bl, Com. 314.

(c) Prac. Reg. 162.

States, January Term, 1842, declares, "No demurrer or plea shall be allowed to be filed to any bill, unless upon a certificate of counsel, that in his opinion it is well founded in point of law, and supported by the affidavit of the defendant, that it is not interposed for delay; and if a plea, that it is true in point of fact." 1 Howard, R. Introduc. 51; 17 Peters, Append. 69; Story Eq. Pl. (3rd ed.) § 441, note (2).

(2) Story Eq. Pl. § 441.

A demurrer is an answer in law to the bill, though not, in a technical

sense, an answer according to the common language of practice. New Jersey v. New York, 6 Peters, 323.

The 32nd Rule of the Equity Rules of the Supreme Court of the United States, January Term, 1842, declares, "The defendant may, at any time before the bill is taken for confessed, or afterwards, with the leave of the Court, demur or plead to the whole bill or to part of it, and he may demur to part, plead to part, and answer as to the residue; but in every case, in which the bill specially charges fraud or combination, a plea to such part must be accompanied with an answer fortifying the plea, and expressly denying the fraud and combination, and the facts, on which the charge is founded." I Howard, Introd. 51; 17 Peters, Append. 16; Story Eq. Pl. § 441, (3rd ed.) note (6).

⁽¹⁾ See Tappan v. Evans, 11 N. Hamp. 311; Harris v. Thomas, 1 Hen. & Munf. 18; Alderson v. Biggars, 4 ib. 472; Story Eq. Pl. § 453; Mitchell v. Lenox, 2 Paige, 280.

The 31st Rule of the Equity Rules of the Supreme Court of the United

parent on the face of the bill, or because of the omission of some matter, which ought to be contained therein, or for want of some circumstances which ought to be attendant thereon, the defendant ought not to be compelled to answer. It therefore demands judgment of the Court, whether the defendant shall be compelled to answer the complainant's bill, or that particular part of it to which the demurrer applies (d) (1).

Admissions by.

A demurrer will lie wherever it is clear that, taking the charges Does not lie in the bill to be true, the bill would be dismissed at the hearing (e), unless it is clear bill but it must be founded on this, that it is an absolute, certain, and would be clear proposition that it would be so (f); for if it is a case of dismissed at the hearing. circumstances, in which a minute variation between them as stated by the bill, and those established by the evidence, may either incline the Court to modify the relief or to grant no relief at all, the Court, although it sees that the granting the modified relief at the hearing will be attended with considerable difficulty, will not support a demurrer (1); therefore, where a bill was filed for the specific performance of an agreement entered into by a bankrupt, by the intervention of an agent, and, previous to the bankruptcy, a correspondence took place, through the agent, as to granting a lease, and the case turned upon the point, whether the facts stated amounted to a perfect agreement, Lord Loughborough thought, that, although the circumstances, as stated in the bill, amounted more to a treaty than a complete agreement, the question whether it was an agreement or not must depend very much upon the effect of the evidence, and therefore overruled the demurrer (g).

As a demurrer proceeds upon the ground that, admitting the Demurrer adfacts stated in the bill to be true, the plaintiff is not entitled to the mits facts to relief he seeks; it is held that, at least for the purpose of argument. all the matters of fact which are stated in the bill are admitted by the demurrer (h) (2), and cannot be disputed in arguing the ques-

But it cannot supply defects in substance, or cure a defective statement of title. Mills v. Brown, and Gable v. Andrus, ubi supra.

⁽d) Ibid. Ld. R. 107; Coop. Eq. Pl. 110; Jones v. E. of Strafford, 3

Lord Annesley, 2 Sch. & Lef. 607. (f) Brooke v. Hewitt, 3 Ves. 253. P. Wms. 80. (g) Brooke v. Hewitt, 3 Ves. 253.
(e) Utterson v. Mair, 2 Ves. J. 95;
(h) E. I. Company v. Hinchman,
4 Bro. C. C. 270; S. C. Hovenden v. 1 Ves. J. 289.

See Story Eq. Pl. § 446, 447, 448; Lube Eq. Pl. 338, 339, 340.
 A demurrer to a bill must be founded on some strong point of law, which goes to the absolute denial of the relief sought, and not on circumstances in which a minute variation may incline the Court either to grant, modify or refuse the application. Verplanck v. Caines, 1 John. Ch. 57.

(2) Story Eq. Pl. § 452; Mills v. Brown, 2 Scam. 549; Gable v. Andrus, 1 Green Ch. 66; Niles v. Anderson, 5 Howard (Miss.) 365; Green v. Robinson, ib. 80; Smith v. Allen, 1 Saxton, (N. J.) 43.

Admissions by. tion whether the defence thereby made be good or not; and such Even though contents of a document be misstated.

admission extends to the whole manner and form in which it is there stated. Upon this ground, where a bill misstated a deed by alleging it to contain a proviso which it did not, Lord Cottenham, upon the argument of a demurrer to the bill, refused to allow the defendant's counsel to refer to the deed itself for the purpose of showing the incorrectness of the manner in which it was set out, although the bill contained a reference for "greater certainty as to its contents," &c. to the deed as being in the custody of the defendants. His Lordship said, that to hold otherwise would be to give the defendants an advantage, depending upon the accident of their having the custody of a document which the bill purported to set out, and would in effect be to decide the question raised by the demurrer upon matter which was dehors the record (i). It should be remarked that the object of referring to the deed, in the case just quoted, was to contradict the statement of a matter of fact in the bill. When the object of referring to the document is not to contradict but to support the plaintiff's case, the Court will, upon the argument of a demurrer, take upon itself to look into it: thus, where a bill for the purpose of carrying the trust of a creditor's deed into execution, was filed by one creditor only on behalf of himself and others, without making all the scheduled creditors parties, or alleging, as a reason for not doing so, that they were very numerous, the V. C. of England held that the Court being, from the reference to the deed in the bill, virtually in the possession of the deed and its schedule, saw for itself that the parties were much too numerous to make it practicable to prosecute a suit if they were all made parties to it (j).

And referred to for greater certainty.

When document referred to in bill may be read by plaintiff.

Where bill professes to set out a deed inaccurately the defendant's possesgion.

Plaintiff will not be bound by his statement upon demurrer.

It is also to be remarked, that where a bill professes to set out a deed inaccurately, and alleges, as a reason for so setting it out, that it is in the possession of the defendants, a demurrer to the because it is in bill cannot be sustained; although, according to the terms of the deed, as stated by the plaintiff, he can take no title under it; because the Court will not, under such circumstances, bind the plaintiff by the statement he has made which he alleges to be inaccurate, and which the defendant, therefore, by his demurrer admits to be so. In a case of this description, if the defendant

(i) Campbell v. Mackay, 1 M. & C. 603, 613. (j) Weld v. Bouham, 2 S. & S.

sion be real estate, refer to the pre-bate copy. Per Sir J. Leach, in Gib-son v. Whithead, 4 Mad. 245. In such a case, where is the Court to find the instrument which can be judicially called the will? Ibid.

⁽j) Weld v. Bouham, z S. & S. 91. It is important to remark, that where a plaintiff refers in his bill to a will, he cannot by virtue of such reference, if the property in discus-

means that the Court should at once be called upon to determine Admissions by. the true construction of the deed, he must plead it (k).

But although a demurrer confesses the matter stated in the bill Matter of fact to be true, such confession is confined to those matters which are only admitted well pleaded, i. c. matters of fact (1) (1). It does not, therefore, by a demurrer, admit any matters of law which are suggested in the bill or inferred from the facts stated (2); for, strictly speaking, arguments, or inferences, or matters of law, ought not to be stated in pleading (m), although there is sometimes occasion to make mention of and not inferthem for the convenience or intelligibility of the matter of fact; ences of law thus, in the case of Campbell v. Mackay, above referred to, the statement, in the bill, that the deed contained a particular proviso, was held to be so admitted by the demurrer that the deed itself could not be referred to for the purpose of contradicting 'the record; but if the bill had gone further, and, after stating the alleged words of the proviso, had averred a legal inference from them which such words did not authorize, the demurrer, although it was held to confess the existence in the deed of a proviso, in the words stated, as a matter of fact, would not have been considered as admitting the inference of law alleged to have arisen from it. An inference of this nature is called a Repugnancy, and it is a or matters rule in pleading that a demurrer will not admit matters either of which are relaw or of fact which are repugnant to each other: thus, where a whether of fact bill was filed for a discovery and for an account and delivery up or law. of the possession of land, on the ground that the plaintiff could not describe the land so as to proceed at Law, by reason of the defendant having got possession of the title-deeds and mixed the boun-

(k) Wright v. Plumptree, 3 Mad. Equity, it is often a more conven-

(l) Ford v. Peering, 1 Ves. J. 72, 78.

(m) Vide, 1 Chitty on Pl. 214. Where it is stated that, in this respect, pleadings at Law appear to differ materially from those in Equity. This, however, is incorrect; the principles of pleading, in this respect at least, are the same both in Equity and at Law; and although in the former, from the greater complexity of the subjects generally brought under the cognizance of Courts of

ient and intelligible course to state the inferences of law which arise from the facts pleaded, and it is therefore frequently resorted to in practice: yet such practice by no means impugns the applicability of the rule of pleading, above laid down, to pleadings in Equity, any more than the occasional adoption of a similar course in pleadings at Law alter the rule of pleading there. Vide Ste-phen on Pleading, 347, from which the next paragraph in the text has been taken.

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⁽¹⁾ See Story Eq. Pl. § 452; Mills v. Brown, 2 Scam. 549; Gable v. Andrus, 1 Green Ch. 66; Niles v. Anderson, 5 Howard, (Miss.) 365; Baker v. Booker, 6 Price, 381.

⁽²⁾ Story Eq. Pl § 452.

record:

Does not admit matters contrary to the

Admissions by daries. Lord Loughborough allowed a demurrer, because the bill was a mere ejectment bill; but he intimated that, even if the bill had been for a discovery only, it could not have been sustained, because the averment, that the plaintiff could not ascertain the lands, was contrary to the facts disclosed in the bill in which the lands were sufficiently described (n); and so where a record is pleaded, it has been held, that a demurrer is never a confession of a thing which is against it, but only of that which may stand with the record (o). Upon this ground where a bill averred that certain sums of money advanced by an intestate to the plaintiff were made as gifts and not as loans, and stated a decree of the Court made in another cause in which the same parties were concerned, by which the Court declared that the advances were loans and not gifts, Lord Cottenham, upon argument of a demurrer to the bill, considered that, the question, whether the demurrer could be held to confess the allegation in the bill that the advances were by way of gift in opposition to the decree of the Court, was so clear, that he would not permit it to be argued by the defendant's counsel (p).

or contrary to that of which the Court takes judicial notice;

e. g. the recognition of foreign governmenta;

war between this country and another.

It may be noticed, as applicable to this point, that when facts are averred in a bill which are contrary to any fact of which the Court takes judicial notice, the Court will not pay any attention to the averment: thus where, in order to prevent a demurrer, it was falsely alleged in the bill, that a revolted colony of Spain had been recognized by Great Britain as an independent state, the V. C. of England, upon the argument of a demurrer to the bill, held, that the fact averred was one which the Court was bound to take notice of as being false, and that he must therefore take it just as if there had been no such averment on the record (q). It is to be observed here, that besides the recognition of foreign states, the Court will also take judicial or official notice of a war in which this country is engaged, but not of a war between foreign or existence of countries (r) (1). The Court is also bound to notice the time of the King's accession, his proclamations, and privileges; time and place of holding Parliaments, the time of sessions and prorogation. and its usual course of proceedings; the Ecclesiastical, Civil, and

⁽n) Loker v. Rolle, 3 Ves. 4, 7.
(o) Arundel v. Arundel, Cro. Jac. M. & C. 173. (q) Taylor v. Barclay, 2 Sim. 213, 12; Com. Dig. Pleader, 2, 6. ante, p. 23. p) Mortimer v. Fraser, 30 Jan. (r) Dolder v. Lord Huntingfield, 1837, reported upon another point, 2 11 Ves. 292, ante, p. 60.

⁽¹⁾ See Baby v. Dubois, 1 Blackf. 255, cited ante, 34, note.

Maritime Laws; the customary course of descent in Gavelkind Admissions by and Borough English tenures; the course of the Almanack (s); the division of England into counties, provinces, dioceses (t); the meaning of English words (1) and terms of art, even when only Facts of which local in their use; legal weights and measures, and the ordinary Court takes judicial cognimeasurement of time; the existence and course of proceeding of zance. the superior Courts at Westminster, and the other Courts of General Jurisdiction (2), such as the Courts of the counties palatine, &c., and the privileges of its own officers (u) (3); it follows. therefore, from the principle before laid down, that where a bill avers any fact in opposition to what the Court is so officially bound to notice, such averment will, in arguing a demurrer to the bill, be considered as a nullity.

#### SECTION II.

# On the Different Grounds of Demurrer.

A DEMURRER may be either to the relief prayed, or it may be to To relief. the discovery only, or to both. If the demurrer is good to the relief, it will be so to the discovery (z), if, therefore, a plaintiff is entitled to the discovery alone, and goes on to pray relief, a general demurrer to the whole bill will be good (y) (4).

(s) Sed vide Mayor of Guildford v. Clark, 2 Vent. 247.

(t) But not the local situation and distance of the different places in a county from each other. Deybel's case, 4 Barn. & Ald. 243.
(u) Stephen on Pl. 349, and vide

1 Chitty on Pl. 216, et seq. where further information on the subject will be found.

(z) Loker v. Rolle, 3 Ves. 4 [Sumner's ed. note (a)]; Ryves v. Ryves, ib. 347 [Sumner's ed. 343, note (a)];

Muckleston v. Brown, 6 Ves. 63; v. Longden, 8 Ves. 3 [Sumner's ed. note (a)]; Williams v. Steward, 3 note (a)]; Williams v. Steward, 3 Mer. 502; Gordon v. Simpkinson, 11 Ves. 509; Speer v. Crawter, 17 Ves. 216.

(y) Price v. James, 2 Bro. C. C. 319; [Fry v. Penn, ib. Perkins's ed. 282, note (a) and cases cited; Collis v. Swayne, 4 Bro. C. C. 480 [Perkins's ed. 481, note (a)]; Albretcht v. Sussmann, 2 V. & B. 328.

⁽¹⁾ Commonwealth v. Kneeland, 20 Pick. 239.
(2) Newell v. Newton, 10 Pick. 470; Hawks v. Kennebec, 7 Mass. 461; Ripley v. Warren, 2 Pick. 592; Despau v. Swindler, 3 Martin, (N. S.) 705; Jones v. Gale, 4 Martin, 635; Woods v. Fitz, 10 Martin, 196.
(3) Ante, 377, note. For a statement of matters of which Courts will take

judicial notice, see 1 Greenleaf, Evidence, § 4, 5, 6; Story Eq. Pl. § 24.

(4) See Miller v. Ford, 1 Saxton, (N. J.) 360; Coombs v. Warren, 17

Maine, 404. It is said by Mr. Justice Story in note to Story Eq. Pl. § 412, remarking

To Relief. Will protect defendant from discov-

But demurrer to discovery not good to relief.

What constitutes a bill for aelief.

With regard to what will constitute a bill for relief for the purpose of supporting a demurrer, it is to be observed, that in Brandon v. Sands (z), it was held, that a mere addition of a prayer for general relief to a bill making a case for discovery only, would not be a ground for allowing a demurrer. The general opinion of the profession, however, appears to have been against that decision, because in every case it ought to appear most distinctly whether the bill is for relief or for discovery only; for if that matter is left in doubt, the defendant may put in his answer, and then the plaintiff may amend his bill by praying specific relief; and it is now a settled rule that a bill praying discovery and concluding with a prayer for general relief, is a bill for relief (a). A prayer will not, however, convert a bill into one for relief, if it merely prays for the equitable assistance of the Court consequential upon the prayer for discovery (b); such as a writ of injunction, or a commission to examine witnesses abroad (c), or that the testimony of witnesses may be perpetuated (d), or that defendant may set forth a list of deeds, &c. (e).

(z) 2 Ves. J. 514 [Sumner's ed. note'(b)].

(a) Angell v. Westcombe, 6 Sim. 30; Ambury v. Jones, 1 Younge, 199. In both these cases the Court gave the plaintiff leave to amend, by striking out the prayer for relief on pay-ment of costs, it being apparent that the insertion of the prayer for relief was made by the inadvertence of the clerk in Court, by whom it was added to the prayer for process.

(b) Brandon v. Sands, ubi supra. (c) Noble v. Garland, 19 Ves. 376;

Lousada v. Templer, 2 Russ. 561; King v. Allen, 4 Mad. 247; Thorpe v. Macauley, 5 Mad. 218; vide etiam, Prec. in Ch. 532; [Morris v. Morgan, 10 Simons, 341.]

d) Hall v. Hoddesdon, 2 P. Wms.
162; Vaughan v. Fitzgerald, Sch. &
Lef. 316; Rose v. Gannel, 3 Atk.
439. Sed vide Angell v. Angell, 1 S. & S. 83, in which, however, there was a prayer for general relief.

(e) Barker v. Ray, 5 Mad. 65; Crow v. Tyrell, 2 Mad. 408.

on the rule in the text, that "the rule formerly adopted in England was different. It was, that if a bill was for discovery and relief, and it was good the party was not entitled to relief, he was not to be prejudiced for having asked too much." To this he cites, Brandon v. Sands, 2 Ves. jr. 514; Salter v. Scarborough, 9 Ves. 75; Attorney-general v. Brown, 1 Swanst. 294; Mitford Eq. Pl. by Jeremy, 183, 184. "In New York," the same learned author adds, "the old English rule is adhered to; and indeed it has much autor adds, "the old English rule is annered to; and indeed it has much to commend it." See Laight v. Morgan, 1 John. Cases, 429; S. C. 2 Caines's Ca. in Error, 344; Le Roy v. Veeder, 1 John. Cases, 423; Le Roy v. Servis, 1 Caines's Ca. in Error, 1; S. C. 2 Caines's Ca. in Error, 175; Kimberly v. Sells, 4 John. Ch. 467; Livingston v. Livingston, 4 John. Ch. 496; Higginbotham v. Burnet, 5 John. Ch. 184.

The proper course is held in New York to be, to demur to the relief and to answer to the discovery. Higginbotham v. Burnet, 5 John. Cff. 184.

The same doctrine was affirmed in the Supreme Court of the United

States in Livingston v. Livingston, 9 Peters, 632, 658, where Mr. Justice Thompson said: "And if any part of the bill is good, and entitles the plaintiff either to relief or to discovery, a demurrer to the whole bill cannot be

But notwithstanding the general rule, that if the relief prayed is unnecessary or improper, the defendant may cover himself by a gene- Defendant ral demurrer; yet this will not preclude the defendant, in cases may demur to where if the bill had been for a discovery only, there would have relief and to discovery. been a right to such discovery from demurring to the relief only, and answering as to the discovery, or in other words, giving the discovery required (f) (1).

The converse of this proposition, however, will not equally hold; But cannot defor it has been held, that where a bill prays relief as well as dis-mur to discovcovery, the defendant cannot demur to the discovery and answer to demurring to the relief, for then he does not demur to the thing required, but relief, to the means by which it is to be obtained (g) (2).

This rule may possibly in some cases be affected by the 36th unless under Order of August, 1841, which is in the following terms: "That no order of Audemurrer or plea shall be held bad, and overruled upon argument

2; Jefferys v. Baldwin, Amb. 164. In Cooper's Equity Pleading, p. 117, the proposition that "notwithstanding the established rule, that whenever the relief prayed is unnecessary or improper, the defendant may cover himself by general demurrer; yet as this does not preclude the defendant from demurring only to relief and answering as to the discovery," is laid down too broadly; it ought to

(f) Hodgkin v. Longden, 8 Ves. have been confined to those cases, in which it is clear that the plaintiff is gone on to pray relief; there can be no doubt that, where the discovery sought is with a view to the relief, a demurrer to the relief would be overruled by an answer to the discovery. Vide Todd v. Gee, 17 Ves. 273.

(g) Morgan v. Harris, 2 Bro. C. C. 121, 124 [Perkins's ed. notes].

sustained. It is an established and universal rule of pleading in Chancery, that a defendant may meet the plaintiff's bill by several modes of defence He may demur, answer and plead to different parts of the bill; so that if a bill for discovery and relief contains proper matter for the one and not for the other, the defendant should answer the proper, and demur to the improper matter. But if he demurs to the whole bill, the demurrer must be overruled."

So in Wright v. Dame, 1 Metcalf, 241, Mr. Justice Putnam, delivering the opinion of the Court, said: "We adopt the old rule of pleading in Equity, that on a general demurrer to the whole bill, if there is any part, either as to the relief or discovery, to which the defendant ought to put in an answer, the demurrer, being entire, ought to be overruled." And he cites 1 Harrison Ch. Pr. (7th ed.) 414: Higginbotham v. Burnet, 5 John. Ch. 186. "The defendant should answer as to the discovery, and demur as to the relief." Laight v. Morgan, 1 John. Cases, 434."

But where a bill seeks general and special relief, and also a discovery, and relief is the principal object, and discovery is sought merely as incidental to the relief, if the plaintiff shows no title to the relief sought, a demurrer lies to the whole bill. Poole v. Lloyd, 5 Metcalf, 525.

A defendant cannot plead or answer, and demur both, to the whole bill or to the same part of a bill. Clark v. Phelps, 6 John. Ch. 214; Beauchamp v. Gibbs, 1 Bibb, 481; Robertson v. Bingly, 1 M'Cord Ch. 352.

⁽¹⁾ See Story Eq. Pl. § 312 and cases in note; Brownell v. Curtis, 10 Paige, 213.
(2) Story Eq. Pl. § 312, in note, § 546, 441; Brownell v. Curtis, 10 Palge, 214.

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only, because such demurrer or plea shall not cover so much of the bill as it might by law have extended to" (1).

But in the case of Dell v. Hale (h), where the defendant demurred to part of the discovery and answered the rest, but did not demur to any of the relief, and it was contended, that the Order above mentioned enabled him so to do, Sir J. L. Knight Bruce, V. C., in deciding against the demurrer and answer, said, "It appears to me that the contention of the demurring defendant is not warranted either by the letter or the spirit of the 36th Order. The object of that Order was, I believe, to introduce this practice, that where there are several questions or matters in a bill, to all of which the demurrer might have extended; and the demurrer, through mistake or otherwise, does not extend to all of them, it is not to be overruled merely on that account. The Order does not say, that in no case shall a demurrer be overruled, but that it shall not be overruled only because it does not cover so much of the bill as it might by Law have extended to. In overruling this demurrer I shall do so, not merely because there is something which it has not but might have covered, but because there is something of a specific and particular nature which it has not covered. Previously to the new rules, though a defendant might generally demur to the relief and give the discovery, yet if he did not question any part of the relief sought, a mere demurrer to discovery would be overruled, because it was considered a contradiction to admit the claim of the plaintiff to relief, and yet to exclude him from the means which the Law allowed him of proving those facts which were essential to his case.

"Here the bill prays relief founded on certain letters — no part of the relief is demurred to. The demurrer is confined to the discovery of those letters, without proof of which the plaintiff might have no case at the hearing. As the defendant could not before the new Orders, so he cannot now file such a demurrer."

Exceptions to rule that defendant cannot demur to discovery, and answer to relief

The rule, therefore, that a defendant cannot demur to the discovery and answer to the relief, seems still generally to apply, but there are exceptions to it, viz. — where the discovery sought would subject the defendant to punishment, or to a penalty, or forfeiture, or to any thing of that nature; or where it would tend to show him to have been guilty of any moral turpitude. In cases of this nature

(A) 2 Y. & C. 1.

⁽¹⁾ The same rule has been adopted by the Supreme Court of the United States. Rule 36th of the Equity Rules, January Term, 1842; Story Eq. Pl. § 443.

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the Court will allow a defendant to protect himself from the particular discovery sought by demurrer, though it will not protect him from the relief prayed, if the plaintiff's title to it can be established by other means than the discovery of the defendant himself. Thus in a bill to inquire into the reality of deeds on a suggestion of forgery, the Court has entertained jurisdiction of the cause, though it does not oblige the party to a discovery, and has directed an issue to try whether the deeds were forged or not (i) (1).

The Court also will not, as we shall see presently, require a defendant to make a discovery of matters which are totally immaterial to the relief prayed (2), or which have been communicated under the seal of professional confidence (3), or which relate entirely to his own title and not to that of the plaintiff (4).

At present our purpose is to consider the grounds of demurrer to relief, we shall then consider those grounds of demurrer which apply to the discovery only.

In pursuance of the arrangement before pointed out (k), the reader's attention will now be directed to the grounds of demurrer which may exist to original bills, exhibited for the purpose of obtaining the decree of the Court touching some right claimed by the person exhibiting the bill, in opposition to rights claimed by the person or persons against whom the bill is exhibited.

Demurrers to bills of this nature may be either: I. To the juris- Different diction; II. To the person; or III. To the matter of the bill, grounds of demurrer to either in substance or form (1).

I. Demurrers to the jurisdiction are either on the ground: 1st, To the juris-That the case made by the bill does not come within the description of cases in which a Court of Equity assumes the power of decision; or, 2dly, That the subject-matter is within the jurisdiction of some other Court.

1st, It would be a task far exceeding the limits of this work, and Demurrer benot strictly within its object, were I to attempt to point out the cause the subject is not cases in which a demurrer will hold to a bill, on the ground that within the juthe case made by it does not come within the ordinary cases for risdiction of a

Equity.

(i) Brownsword v. Edwards, 2 Ves. 243, 246; Attorney-general v. Hindley, Prec. in Ch. 214. (k) Ante, p. 351.(l) Coop. Eq. Pl. 118.

⁽¹⁾ Post, 621. (2) Post, 636, 637.

⁽¹⁾ Post, 637, et. seq.

⁽²⁾ Post, 645, et. seq.

To the Juris- relief in a Court of Equity. To do so effectually, under any cirdiction.

cumstances, would be an easy undertaking, but to accomplish it in the concise form in which it must be done in order to keep the present Treatise within a tolerable compass, would be impossible. I shall therefore merely direct the reader's attention to the admirable statement of the general objects of the jurisdiction of the Court of Equity which is to be found in Lord Redesdale's Treatise upon Pleading (1), and observe, that if the case made by the bill appears to be one on which the jurisdiction of the Court does not arise, a demurrer will hold (2). And it is to be observed, that a demurrer arises from the will hold equally where the defect arises from the omission of matter which ought to be contained in the bill, or of some circumstance which ought to be attendant thereon for the purpose of bringing the case properly within the jurisdiction (3), as, where it appears that the case is such as, under no circumstance, can be brought e g. a previous within the ordinary scope of a Court of Equity (m) (2); for this reason, wherever it is necessary, in order to afford a ground for the

Where defect omission of a necessary circumstance,

trial at law.

### (m) Lord Red. 108.

(1) See also Story Eq. Jurisprudence; Story Eq. Pl. § 466, et seq. (2) Story Eq. Pl. § 466, 467; Mitford Eq. Pl. by Jeremy, 110, et seq.; Blount v. Garen, 3 Hayw. 88; Livingston v. Livingston, 4 John. Ch. 287.

Where a bill in Equity sets forth various claims, and the defendant files a general demurrer, the demurrer will be overruled if say of the claims be proper for the jurisdiction of the Court of Equity. Castleman v. Veitch, 3 Rand, 598; Kimberly v. Sells, 3 John. Ch 467; Graves v. Downey, 3 Monroe, 356; Blount v. Garen, 3 Hayw. 88

A demurrer to the whole of a bill containing some matters relievable and others not, is bad, unless the bill is multifarious. Dimmock v. Bixby, 20 Pick. 368.

In order to sustain a demurrer for want of jurisdiction to the whole of a bill, it must appear that no substantial and essential part of the complaint is within the jurisdiction of the Court. Boston Water Power Co. v. Boston & Worcester R. R. 16 Pick. 512; post, 651, note.

(3) Whenever there is no sufficient ground shown in the bill for the interference of a Court of Equity, the defendant may demur to the bill for want of Equity to sustain the jurisdiction. Story Eq. Pl. § 472, 10, 34.

The Courts of Massachusetts, not having general jurisdiction in Equity, the bill must show affirmatively, that the case is within their jurisdiction, and the question whether it is so shown or not, is properly raised by a general demurrer. May v. Parker, 12 Pick. 34.

In all bills in Equity in the Courts of the United States, the citizenship should appear on the face of the bill to entitle the Court to take jurisdiction, otherwise the cause will be dismissed. Dodge v. Perkins, 4 Mason, 435; Story Eq. Pl. § 492. The want of such averment may be taken advantage of by demurrer. Story Eq. Pl. § 492.

Where the want of jurisdiction is apparent on the face of the proceedings,

from a defective statement of the citizenship of the different parties, it is fatal at all times, and may be insisted on by way of motion or otherwise, in any stage of the cause, and even upon appeal. Dodge v. Perkins, 4 Mason, 437. See also Story Eq. Pl. § 26, note, § 492, 10, 34; Bingham v. Cabet, 3 Dall. 382; Jackson v. Ashton, 8 Peters, 148, ante, 360, note.

interference of the Court, that the plaintiff's right should have been To the Jurispreviously established at Law, if the bill does not state that it has been so established, the defendant may demur, as in Weller v. Smeaton (n), where the bill stated the plaintiff to be lessee of an ancient mill, and that the defendant had erected floodgates and other works on the river, which deteriorated the plaintiff's right to the mill, and prayed that the defendant might be decreed to pull down those works, (such works having been erected three years,) and restrained from building new ones, but which did not state the plaintiff's right to have been established at law, a demurrer for want of equity was held good (o).

A demurrer, because the subject-matter of the suit is That the subwithin the cognizance of some other Court, may be on the ground is within the that it is within the jurisdiction either; 1, of a Court of Com-jurisdiction of mon Law; 2, of the Ecclesiastical Court; 8, of the Court of Ad-some other Court. miralty or Commissioners of Prize; 4, of the Court of Bankruptcy; 5, of some statutory jurisdiction; or, 6, of some other Court of Equity.

1. If it appears by the bill, that the plaintiff can have as effect- That a Court ual and complete a remedy in a Court of Law as in a Court of of Law is the Equity, and that such remedy is clear and certain, the defendant nal. may demur (p) (1); thus where a bill was brought by the executrix of an attorney, for money due from the defendant for business done as an attorney, the Court allowed a demurrer to the relief, because the remedy was at Law, and an Act of Parliament (q)had pointed out a summary method of obtaining it (r). hwere a sum of money has been paid for goods sold and exported

proper tribu-

(n) 1 Cox. 102. (a) Vide etiam Whitchurch v. Hide, 2 Atk. 391; Lord Tenham v. Herbert, ibid. 483; Welby v. Duke of Portland, 6 Bro. P. C. 575; Parish of St. Luke v. The Parish of St. Leonard, 1 Bro. C. C. 40 [Perkins's ed. 41, note (b); 1 Story Eq. Jur. § 617]. It is to be observed, that it is not necessary to establish a right at Law before filing a bill, where the right appears on record, as under letters patent for a new invention, or is grounded on Act of Parliament, as in cases of bills by authors or their assignees, to restrain the sale of books, or where the right appears on record by a former decree of the Court, or where the right, prima facie and of

common right, is vested in the Crown. Lord Red. 147.

(p) Coop. Eq. Pl. 125.
(q) 2 Geo. II. c. 23, s. 22.
(r) Parry v. Owen, 3 Atk. 740.
Amb. 109, vide etiam, the form of the demurrer, Beames on Costs, 376. It has been held, however, that a clerk in Court being an ancient officer of in Court, being an ancient officer of the Court, may maintain a bill against a solicitor for payment of a certain sum stated as the amount of his demand for fees and disbursements, Barker v. Dacie, 6 Ves. 681; vide etiam, Raneleigh v. Thornhill, 1 Vern. 203, and Mr. Blunt's note to Parry v. Owen, in his edition of Ambler, 109.

⁽¹⁾ Mitford Eq. Pl. by Jeremy, 123; Story Eq. Pl. § 473; Cooper Eq. Pl. 124; O'Brien v. Irwin, Ridg. Lap. & Scho. 361; Reed v. Bank of New-

diction.

To the Juris- to America, and, after the ship had sailed with them, it was discovered that there had been fraud used in the quantity and quality of the goods, but the plaintiff, being threatened with an action, paid the original price under a protest that he would seek relief in Equity, yet a demurrer was allowed to a bill, when it was afterwards brought for a discovery and account; though it is quite clear that if the plaintiff had not paid the money, the Court would have granted him relief by injunction against the threatened price (s).

> Upon the same principle, if a bill is for an account, where the subject is matter of set-off, and capable of proof at Law, it may be demurred to (t) (1). And so if a bill is for the possession of land, or an Ejectment Bill, as it is called, it may be demurred to even though the bill charges the defendants to have got the titledeeds, and to have mixed the boundaries, and prays a discovery, possession, and account: for the plaintiff, though he is entitled to a discovery, by praying such relief, has rendered his whole bill liable to demurrer (u) (2).

(s) Kemp v. Pryor, 7 Ves. 237. (t) Dinwiddie v. Bailey, 6 Ves. 136 [Sumner's ed. note (a)]. It is a difficult question to determine when there is an account between two persons, consisting of items cognizable at Law, under what circumstances a concurrent jurisdiction in Equity exists. The subject is discussed in Story's Eq. J. vol. 1, § 454, et seq.

And it may be noted here, that in the

recent case of Foley v. Hill, 1 Ph. 399, where the account consisted of three items only; one on one side, and two on the other; Lord Lynd-hurst dismissed the bill, on the ground that it was not a proper sub-ject for equity. See also Pearce s. Creswick, 2 H. 296.

(a) Loker v. Rolle, 3 Ves. 4 [Sumner's ed. note (a)]; Ryves v. Ryves, ib. 323 [Sumner's ed. note (a)].

bury, 1 Paige, 215; Bosley v. M'Kim, 7 Harris & John. 160; Reed v. Clarke, 4 Monroe, 19; N. London Bank v. Lee, 11 Conn. 112; Coombs v. Warren, 17 Maine, 404; Caldwell v. Knott, 10 Yerger, 209; Clark v. Flint, 22 Pick. 231; Hoare v. Contencin, 1 Bro. C. C. (Perkins's ed.) 27, 29, note (a) and cases cited; Hammond v. Messenger, 9 Simons, 327; Bottorf v. Conner, 1 Blackf. 227.

(1) The Court of Chancery exercises a concurrent jurisdiction with Courts of Law in all matters of account. Duncan v. Lyon, 3 John. Ch. 351, 361; Ludlow v. Simons, 2 Caines's Ca. Error, 1, 38, 52; Post v. Kimberly, 9 John. 470, 493; Hawley v. Cramer, 4 Cowen, 717; Martin v. Spiera, 1 Hayw. 371; Stothart v. Burnet, Cooke, 420; Breckenridge v. Brooks, 2 A. K. Marsh. 338; Fowle v. Lawrason, 5 Peters, 495; Cummings v. White, 4 Blackf. 356; Power v. Reeder, 9 Dana, 10; 1 Story Eq. Jur. § 451-457; King v. Baldwin, 17 John. 384.

But to sustain a bill for an account, there must be mutual demands, or a series of transactions on one side, and of payments on the other. Porter s.

Spencer, 2 John. Ch. 171; 1 Story Eq. Jur. § 458.

Where all the items of account are on one side, the bill cannot be sustained. Pearl v. Corp. of Nashville, 10 Yerger, 179; 1 Story Eq. Jur. § 458, 459. Unless a discovery is sought and obtained in aid of the account. 1 Story Eq. Jur. § 67, 458, 459, and cases cited. See Pleasants v. Glassock, 1 Smedes & Marsh. 17.

(2) See Story Eq. Pl. 476; 1 Story Eq. Jur. 71; Cooper Eq. Pl. 125; Russell v. Clarke, 7 Cranch, 69, 89.

It is to be recollected that, in many cases, Courts of Equity To the Jurishave assumed a concurrent jurisdiction with Courts of Law, as in cases of account (1), partition, and assignment of dower (x) (2); Demurrer does and that where an instrument on which a title is founded is lost, not lie where Courts of Law or fraudulently suppressed or withheld from the party claiming have a concurunder it, a Court of Equity will interfere to supply the defect oc- rent jurisdiccasioned by the accident or suppression, and will give the same remedy which a Court of Common Law would have given if the instrument had been forthcoming (y) (3). In all such cases, therefore, a demurrer, because the subject-matter of the suit is within the jurisdiction of a Court of Law, will not hold.

Amongst other cases in which Courts of Equity and Courts of as in cases of Law entertain a concurrent jurisdiction, are those arising upon fraud, frauds; therefore, where fraud is made the ground for the interferance of this Court, a demurrer will not hold (4). There is, how-unless it be ever, one case in which fraud cannot be relieved against in Equi-fraud in proty, though a discovery may be sought: this is, the case of fraud ecution of a in obtaining a will, which, if of real estate, must be investigated will. in a Court of Common Law; and if of personal estate, in the Ecclesiastical Court (z) (5)

It may also be noticed here, that although, in some cases, the Will lie to a Court will, where a question of fact arises in the course of a bill praying a feigned issue. cause, direct a feigned issue to be tried in a Court of Law, for the purpose of establishing or negativing such fact; the Court will not entertain a bill to enforce the specific performance of an agreement, and praying in the alternative that, if it cannot be performed, an issue or an inquiry before the Master may be directed, with a view to ascertain the damages. The plaintiff must seek that remedy, if he wishes it, at Law (z).

(z) Lord Red. 120, 123.

3 Atk. 17; Allen v. Macpherson, 1 Ph. 133; Gingell v. Horne, 9 Sim. 539.

(y) Ibid. 113.(z) Kenrick v. Bramsby, 7 Bro. P. C. 437; Webb v. Claverden, 2 Atk. 424; Bennet v. Vade, ib. 324; Anon. Gee, 17 Ves. 279.

(z) Per Lord Eldon, in Todd v.

(1) See post, 625, et seq.
(2) Story Eq. Jur. § 75, et seq.
(3) Story Eq. Jur. § 75, et seq.
(3) Story Eq. Jur. 81, et seq. and cases cited in notes; Bromley v. Holland, 7 Summer's Vesey, 3 note (d).
(4) Story Eq. Jur. § 184, et. seq. and notes; Anderson v. Lewis, 1 Freeman, 206.

In many cases it has been held, that where a party has a just title to come into Equity for a discovery, and obtains it, the Court will go on and give him the proper relief; and not turn him round to the expenses and inconveniences of a double suit at law. See a full discussion of this subject, and a citation of the authorities, 1 Story Eq. Jur. § 64 k, et seq.

⁽⁵⁾ I Story Eq. Jur. § 184, note, § 238; 2 ib. § 1445–1448; Story Eq. Pl. § 474; Gaines v. Chew, 2 Howard, (U. S.) 619; Tarver v. Tarver, 9 Peters, 180.

To the Jurisdiction.

For that the **Ecclesiastical** Court has jurisdiction.

2. That the objection, on account of the jurisdiction, is not confined to cases cognizable in Courts of Law, is evident from the case put of proceedings instituted to set aside a will of personal estate on the ground of fraud, which can only be done in the Ecclesiastical Courts; those Courts having exclusive jurisdiction in all cases relating to wills and intestacies of persons dying possessed of personal property (1). The Ecclesiastical Courts have also exclusive jurisdiction of the right and duties arising from the state of marriage; and the Court of Chancery, therefore, will not entertain a bill to enforce a contract for the separation of husband and wife (a).

It is to be observed here, that Courts of Equity have, in the case of tithes and in the disposition of the effects of persons dying testate or intestate, assumed a concurrent jurisdiction with the Ecclesiastical Courts, as far as the jurisdiction of these Courts extend; indeed the Courts of Equity, in many of those cases, can give more complete remedy than can be afforded in the Ecclesiastical Courts, and in some cases the only effectual remedy (b) (2).

For that the Court of Admiralty is the proper jurisdiction.

3. If the Court of Admiralty or Court of Prize is competent to decide upon the subject-matter of the suit, a demurrer will also hold. Upon this principle the Court refused to interfere by granting a prohibition against a monition to bring in property which had been received as a consignment to a merchant; Lord Eldon holding, that the Prize Jurisdiction extends to the question, whether a person who received and sold the property, received it as consignee for a valuable consideration, or as a prize agent (c) (3).

For that the ruptcy is the proper jurisdiction.

4. As the Court of Bankruptcy only exercises jurisdiction in Court of Bank- those cases which were formerly considered to be within the jarisdiction of the Lord Chancellor sitting in bankruptcy, any bill which, previously to the establishment of that Court, would have been liable to demurrer, because the subject of it was within the

> Worrall v. Jacob, 3 Mer. 268; Durand v. Durand, 2 Cox, 207; Duncan v. Duncan, Coop. C. C. 254. For the distinctions upon this subject, as to cases in which the Court will interfere to enforce the payment of sep-

(a) Wilkes v. Wilkes, 2 Dick. 791; arate maintenance to a wife pending a separation, vide 2 Roper on Husband and Wife, cap. 22, s. 3; [Story Eq. Jur. § 1427-1429 and notes.]

(b) Lord Red. 125.

(c) Case of the Danish Ship Noy-

somhed, 7 Ves. 593.

⁽¹⁾ See Jones v. Frost, Jacob, 466. (2) I Story Eq. Jur. § 589-608; Story Eq. Pl. § 491; Mitford Eq. Pl. by Jeremy, 125, 126, 136.
(3) Story Eq. Pl. § 490.

jurisdiction of the Lord Chancellor, will still be liable to demur- To the Jurisrer, because the subject-matter is within the jurisdiction of the Court of Bankruptcy. A special demurrer on the ground that the plaintiffs might, upon their own showing, have had full and complete relief under the jurisdiction of the Lord Chancellor in bankruptcy, was allowed in Saxton v. Davis (d), which has been before referred to; and the principles upon which the Court proceeded in that case are fully stated in the judgment of Lord Eldon, upon that occasion, and are also alluded to in a former part of this Treatise, where the effect of bankruptcy upon proceedings in this Court has been discussed at some length (e).

diction.

5. The ground upon which, before the establishment of the That a sum-Court of Bankruptcy, demurrers, by reason that the matter was mary jurisdiction is proviwithin the jurisdiction of the Lord Chancellor in bankruptcy, ded by statute. were allowed was, because the legislature had provided a summary course of proceeding for the decision of the question by application to the Lord Chancellor under the statutes relating to bankrupts; and the same ground of demurrer will be good in other cases where such a summary mode of proceeding has been provided by statute. Thus in Parry v. Owen (f), which has been before referred to, as a case in which a demurrer was allowed to a bill filed by the executrix of an attorney to be paid his bill for business, the grounds of demurrer stated on the record were, "that the plaintiff's remedy to recover what may appear to be due to her from the defendant, touching the matters aforesaid. is and ought to be by suit at Law, where the matters are properly triable and determinable, or by application to this Court in a summary way, and not by suit in this Court," &c. (g).

In connection with this part of the subject, may be mentioned, In cases of the questions which have arisen as to the right of the Court to en- awards. tertain bills to set aside awards made under submissions, which are agreed to be made rules of Court pursuant to the 9 & 10 Will. III. c. Upon this point much difference of opinion has existed. Dawson v. Sadler (h), Sir J. Leach, V. C., declared his opinion to be, that where by the agreement of reference the submission is to be made a rule of any Court, there the only course of proceeding to impeach the award is to make the submission a rule of that Court, and to apply summarily for its aid: that the mere circumstance

⁽d) 18 Ves. 72. (e) Ante, p. 71; vide et parte Tarleton, 19 Ves. 464. vide etiam, Ex

⁽f) Ante, p. 609.

⁽g) Vide the copy of the demurrer in this case, in Mr. Blunt's edition of Ambler, 109, n. 2, and Beames on Costs, 376.

⁽A) 1 S. & S. 537, 542.

To the Juris- of its not having been made a rule of Court, would not give the Court jurisdiction, because either party has a right to take that step, and cannot transfer the jurisdiction by neglecting to do as act within his own power (i); but the V. C. of England has expressed his opinion to be, that upon the words of the statute, the original inherent jurisdiction of the Court is not taken away, except where the submission has been made a rule of a Court of Law: and that the authorities show, that even in that case it is not of necessity taken away, but will remain in case the Court of Law will not or cannot act upon the award (k).

With respect to the objection, that some other Court of Equity

That some other Court of has the proper jurisdiction (1), it is to be observed that the estab-Equity has jurisdiction.

lishment of Courts of Equity has obtained throughout the whole system of our judicial polity, and that most of the inferior branches of that system have their peculiar Courts of Equity; the Court of Chancery assuming a general jurisdiction in cases not within the bounds or beyond the powers of inferior jurisdictions (1). The principal of the inferior jurisdictions in England which have cognizance of equitable cases are those of the counties palatine of Lancaster and Durham (m), the Courts of the two Universities of Oxford and Cambridge, the Courts of the city of London, and the Cinque Ports (n); and wherever it appears upon the face of the bill, that any of these Courts has the proper jurisdiction, either immediately or by way of appeal, the defendant may demur to the jurisdiction of the Court of Chancery (o). Thus, to a bill of appeal and review of a decree in the county palatine of Lancaster,

the defendant demurred, because, on the face of the bill, it was

e.g. the Courts of the counties palatine, &c.

- (i) Vide Davis v. Getty, 2 S. & S. 411.
- (k) Vide Nicholls v. Roe, 5 Sim. 156, and the cases cited in his Honor's judgment.

(l) Lord Red. 151.

- (m) By the 6 & 7 Will. IV. c. 19, the palatine jurisdiction of the county palatine of Durham has been separated from the bishoprick and transferred to the Crown, but the Courts still remain
- (n) Lord Red. 151. Formerly the county palatine of Chester and the principality of Wales had Courts of equitable jurisdiction; viz. in the for-mer, the Court of the Chamberlain of Chester, and in the latter, the Courts

of Great Sessions; but these Courts have been abolished by the 11 Geo. IV. & 1 Will. IV. c. 70, s. 14.

(o) It has been decided that the Stannary Courts in Devonshire and Cornwall, held for the administration of justice among the tinners therein, in virtue of a privilege granted to the workers of the mines, to sue and be swed only in their own Courts, that they may not be drawn from their business, which is highly profitable to the public, by attending law suite in other Courts, are only Courts of Law, and not Courts both of Law and Equity. Trelawney v. Williams. 2 Vern. 483.

See Story Eq. Pl. § 490; Mitford Eq. Pl. by Jeremy, 125, 126; Mead v. Merritt, 2 Paige, 402.

apparent that the Court of Chancery had no jurisdiction, and the To the Jurisdemurrer was allowed (p): demurrers of this kind, however, are very rare; for the want of jurisdiction can hardly be apparent upon the face of the bill, at least so conclusively as to deprive the Court of Chancery of cognizance of the suit; it being a rule that, where a Court is a superior Court of general jurisdiction, the presumption will be, that nothing shall be intended to be out of its jurisdiction that is not shown or intended to be so (q). The general way of objecting to the jurisdiction of the Court is by plea; and in Roberdeau v. Rous (r), in which a bill was filed for delivery of possession of lands in St. Christopher's, the Lord Chancellor held, that the objection that the Court had no jurisdiction over land in St. Christopher's, although right in principle, was irregularly and informally taken by demurrer, and should have been pleaded. Lord Redesdale, however, appears to have been of opinion, that the rule, that the objection to the jurisdiction should be pleaded, and not be taken by demurrer, can only be considered as referring to cases where circumstances may give the Chancery jurisdiction, and not to cases where no circumstances can have that effect; and that, where all the circumstances which are requisite in a plea, to show that the Court has no jurisdiction, are shown in the bill, a demurrer will lie (s). What those circumstances are, will be stated when we come to treat of pleas to the jurisdiction (t); in the mean time, it may be observed, that if the objection on the ground of jurisdiction is not taken in proper time, viz., either by Within what demurrer or plea, before the defendant enters into his defence at time objection large, the Court having the general jurisdiction, will exercise must be taken. it (1), unless in cases where no circumstances whatever can give the Court jurisdiction, as in the case before put, of a bill of appeal and review from a decree in a county palatine (z), in which case, the Court cannot entertain the suit, even though the defendant does not object to its deciding on the subject (x) (2).

(p) Jennet v. Bishopp, 1 Vern.

ground that the whole of the matters were in question between the parties, and might have been the subject of adjudication in a suit before the Supreme Court of Newfoundland.

⁽q) Per Lord Hardwicke, Earl of Derby v. Duke of Athol, 1 Ves. 203. (r) 1 Atk. 543.

⁽s) Lord Red. 152. In the case of Henderson v. Henderson, 3 H. 100, a demurrer was allowed on the

⁽t) Post, Chap. XIV.

⁽u) Ubi Supra. (x) Lord Red. 153.

⁽¹⁾ Livingston v. Livingston, 4 John. Ch. 287; Underhill v. Van Cortlandt, 2 John. Ch. 369.

⁽²⁾ Ante, 608, note; Dodge v. Perkins, 4 Mason, 437; Story Eq. Pl. § 10,34,492.

To the Jurisdiction.

Demurrers to the person II. The objections arising from the personal disability of the plaintiff, have been treated of at considerable length in the third Chapter of this Treatise, in which the disabilities that incapacitate a plaintiff from suing have been fully discussed (1); all, therefore, that need now be said on the subject is, that if any of these incapacities appear upon the face of the bill, the defendant may demur. So, also, he may if the incapacity is such only as prevents the party from suing alone, as in the case of an infant or a married woman, an idiot or a lunatic, in which case, if no next friend or committee be named in the bill, a demurrer will lie (y) (2).

Objection extends to the whole bill. It is to be observed, that this objection extends to the whole bill, and that advantage may be taken of it, as well in the case of a bill for discovery merely, as in the case of a bill for relief. For the defendant in a bill for discovery, being always entitled to costs after a full answer as a matter of course, would be materially injured by being compelled to answer a bill by persons whose property is not at their own disposal, and who are therefore incapable of paying the costs.

Demurrer to the substance of the bill. III. We come now to the consideration of demurrers arising upon objections applying more specifically to the matter of the bill; these may be either to the substance or to the form in which it is stated. Demurrers to the substance, are: 1st, that the plaintiff has no interest in the subject; 2nd, that although the plaintiff has an interest, yet the defendant is not answerable to him, but to some other person; 3rd, that the defendant has no interest; 4th, that the plaintiff is not entitled to the relief which he has prayed; 5th, that the value of the subject-matter is beneath the dignity of the Court; 6th, that the bill does not embrace the whole matter; 7th, that there is a want of proper parties; 8th, that the bill is multifarious, and improperly confounds together distinct demands; to which may be added, 9th, that the plaintiff's remedy is barred by length of time; and 10th, that it appears by the bill, that there is another suit depending for the same matter.

Want of interest in the plaintiff.

1. In a former section (z) in which the matter of a bill has been discussed, the reader's attention has been directed to the necessity of showing that the plaintiff has a claim to the thing demanded, or such an interest in the subject as gives him a right to

⁽y) Ibid.

⁽z) Chap. VI. sect. 4.

⁽¹⁾ Ante, 86, et seq.
(2) See the form of a demurrer in such case, Willis, 449. A lunatic must be made a party, though his committee is so, or a demurrer lies. Harrison v. Rowan, 4 Wash. C. C. 202.

institute a suit concerning it (a) (1). All, therefore, that need now to be done in illustration of the proposition, that the want of interest in the plaintiff in the thing demanded, or of a right to institute a suit concerning it is a good cause of demurrer, is to refer to that section where the nature of the interest which a plaintiff must have in the subject-matter, has been pointed out. reader will there observe, that the plaintiff must not only have an existing interest in the subject-matter (b), and one capable of being defeated, but he must also show a proper title to institute a suit concerning it, or else his bill will be liable to demurrer. The nature of the title to be shown, where a plaintiff claims as a representative or under a derivative title, has been there pointed out, and the rule, that all preliminary acts necessary to complete the plaintiff's title must be shown, has also been discussed. reader will observe, that the necessity of showing a proper title in a plaintiff is not confined to one plaintiff only, but that if several persons join in a bill, and it appears that one of them has no interest, the bill will be open to demurrer, though it appears that all the other plaintiffs have an interest in the matter, and a right to institute a suit concerning it (c) (1).

To the Sub-Bill.

2, 3. The same section also exhibits the nature of the privity that defendant is not anwhich it is necessary the bill should aver to be existing between swerable to the plaintiff and defendant (2); and the application of the rule plaintiff but to which requires that the bill should show that the defendant has an person. interest in the subject-matter of the suit (3). It also points out the exceptions to the rule in certain cases in which persons who That defenhave no interest in the subject-matter, may be made parties for dant has no interest. the purpose of eliciting a discovery from them, and in which they are prevented from availing themselves of a demurrer to avoid answering the bill (d).

4. It has been before stated as one of the requisites to a bill, That the bill that it should pray proper relief, to which may be added, that, if does not pray for any reason founded upon the substance of the case, as stated in the bill, the plaintiff is not entitled to the relief he prays, the

⁽a) Page 359. (b) Ante, p. 362.

⁽c) Page 362, and 347. (d) Ante, page 372, and 342.

⁽¹⁾ Mitford Eq. Pl. by Jeremy, 154, 158. If of several plaintiffs some have an interest in the matter of the suit, and others have no interest in it, but are merely the agents of their co-plaintiffs, a general demurrer to the whole bill is a good defence. King of Spain v. Machado, 4 Russ. 224; and see Cuff v. Platett, ib. 242; Clarkson v. De Peyster, 3 Paige, 339.

(2) Mitford Eq. Pl. by Jeremy, 158.

⁽³⁾ Mitford Eq. Pl. by Jeremy, 160.

To the Substance of the Bill.

defendant may demur; many of the grounds of demurrer, already mentioned, are perhaps referrible to this head; and, in every instance, if the case stated is such that, admitting the whole bill to be true, the Court ought not to give the plaintiff the relief or assistance he requires, either in whole or in part, the defect thus appearing on the face of the bill, is a sufficient ground of demurrer (1).

Effect of eral relief.

It is to be observed, in this place, that the question upon a deprayer for gen- murrer of this nature, is frequently, not whether, upon the case made by the bill, the plaintiff is entitled to all the relief prayed, but whether he may, under the prayer for general relief, be entitled to some relief (e): the question how far the defects in the relief prayed in the prayer for special relief may be supplied under the prayer for general relief, which usually forms part of every bill, has been before discussed; it is only necessary now to remind the reader that such relief must be consistent with the special prayer, as well as with the case, made by the bill.

That the subject-matter is not of sufficient value.

5. It has been before observed, that every bill must be for a matter of sufficient value, otherwise it will not be consistent with the dignity of the Court to entertain it (f) (2). The usual method of taking advantage of an objection of this nature is, as we have seen, by motion to take the bill off the file. There is no doubt, however, that if the objection appears upon the face of the bill, a demurrer, upon the ground of inadequacy of value will be held good (3).

That bill does not embrace the whole matter.

- 6. A bill must not only be for matter of a sufficient value, but it must be for the whole matter. It is not, however, necessary to
- (c) Ante, page 444, Hartley v. Rus-(f) Ante, page 378. sell, 2 S. & S. 244, 253.

case for equitable cognizance. Bleeker v. Bingham, 3 Paige, 246.

See the form of a general demurrer for want of Equity, Willis, 461; Story

Eq. Pl. § 483 (3rd ed.) note (4).

v. Bunce, 1 Edw. 583. See further, Moore v. Lyttle, 4 John Ch. 183; Fullerton v. Jackson, 5 ib. 276; Douw v. Sheldon, 2 Paige, 303; Vredenburg v. Johnson, 1 Hopk. 112; Mitchell v. Tighe, 1 Hopk. 119.

⁽¹⁾ A demurrer for want of Equity cannot be sustained unless the Court is satisfied that no discovery or proof properly called for by, or founded upon, the allegations in the bill, can make the subject-matter of the suit a proper

⁽²⁾ Ante, 378, note.
(3) If it appear on the face of the bill, that the matter in dispute, exclusive of costs, does not exceed the amount to which the jurisdiction of the Court is limited, the defendant may either demur, or move to have the bill dismissed with costs; or if it does not appear on the face of the bill, it may be pleaded in bar of the suit. Smets v. Williams, 4 Paige, 364; McElwain v. Willis, 3 Paige, 505; S. C. on Appeal, 9 Wendell, 548; Schræppels. Redfield, 5 Paige, 245; Bradt v. Kirkpatrick, 7 Paige, 62.

By exclusive of costs is meant the costs of the suit in Chancery. Van Tyne

discuss here the principle and application of this rule, the reader's To the Subattention having been already fully called to it: all that need be said is, that if it appears, by the bill, that the object of the suit does not embrace all the relief which the plaintiff is entitled to have against the defendant, under the same representation of facts. it will be liable to demurrer, unless it comes within any of the exceptions before pointed out (g).

7. The subject of who are the proper parties to be brought Want of parbefore the Court, for the purpose of enabling a Court of Equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the Court perfectly safe to those who are compelled to obey it, and to prevent future litigation, has been before so fully discussed (h) (1), that nothing remains to be said upon it here further than to remind the reader that wherever a want of parties appears on the face of a bill, it is a cause of demurrer (2), unless a sufficient reason for not bringing them before the Court is suggested, or unless the bill seeks a discovery of the persons interested in the matter in question for the purpose of making them parties (i).

It is to be observed that the circumstance, that if all the parties will hold alinterested in the subject of the suit were to be brought before the though the addition of new Court, the bill would be multifarious, has been held to be no rea- parties would son for the Court proceeding in the absence of any person who be multifaought to be present, as to any part of the case, and that such a rious. ground cannot be urged in answer to a demurrer for want of par-

A demurrer for want of parties must show who are the proper parties; not indeed by name, for that might be impossible; but in such manner as to

⁽g) Ante, 378. (h) Ante, Chap. V. 240 et seq.

⁽i) Lord Red. 190.

⁽¹⁾ See Mitford Eq. Pl. by Jeremy, 164 et seq.; Story Eq. Pl. § 72-236.
(2) Mitford Eq. Pl. by Jeremy, 180; Story Eq. Pl. § 541; Elmendorf v. Taylor, 10 Wheaton, 152; Crane v. Deming, 7 Conn. 387; Mitchell v. Lenox, 2 Paige, 280; Robinson v. Smith, 3 ib. 222.

See the form of a demurrer for want of parties, Willis, 462 and note (b); 2 Eq. Drafts, 81; Edwards on Parties, 275; Story Eq. Pl. § (3rd ed.), 543,

not indeed by name, for that might be impossible; but in such manner as to point out to the plaintiff the objection to his bill, and enable him to amend by adding the proper parties. Mitford Eq. Pl. by Jeremy, 180, 181; Attorney-genl. v. Poole, 4 My. & Craig, 17; Story Eq. Pl. § 543; ante, 333.

It has, however, been held, that upon a demurrer to a bill for want of Equity, the objection, that the bill is defective for want of parties, may well be taken. Vernon v. Vernon, in Chancery (England), Feb. 1837, cited Story Eq. Pl. § 543 (3rd ed.) note (4). So the objection may be taken in the same way, if persons are improperly made plaintiffs. Gething v. Vigurs, before the V. Chancellor of England, Nov. 1836, cited Story Eq. Pl. ubi supra.

To the Substance of the Bill.

ties (k) (1). It has, however, been held to be a sufficient reason for the Court, upon argument of the demurrer, to allow the bill to be amended more generally than by merely adding parties; and in The Attorney-general v. The Merchant Tailors' Company (I), the plaintiff was permitted to amend, by striking out the matter which occasioned the necessity for additional parties; and in Lumsden v. Fraser, before referred to, leave was, on this ground, given to the plaintiff to amend his bill generally (m).

Whether a demurrer for want of parties can be put in to part of a bill.

It is to be remarked, that there appears to be some doubt whether, in cases where the objection for want of parties applies only to part of the bill, a demurrer to the whole bill can be supported; or whether the part of the bill to which such demorrer applies, ought not to be specially pointed out. The doubt is stated in The East India Company v. Coles (n), in which Lord Thurlow appears to have been inclined to think that there could not be a partial demurrer for want of parties, and that therefore a demurrer to the whole bill was proper, but to have wavered in his opinion, in consequence of some cases cited to him by Mr. Mitford, in which such partial demurrer had been allowed (a). The consequence was, that the case stood over till another day, before which the plaintiffs' counsel amended their bill, paying the costs of the demurrer; so that the question still remains undecided. In the absence, therefore, of further authority upon this point, all that can be done is, to suggest that, although the authorities cited by Mr. Mitford, in the above case, show that a defendant may make the absence of parties the ground of partial demurrer, yet they do not go the length of establishing the proposition, that where the objection does not go to the whole bill, a general demurrer will not As far as negative authority goes, the case of Lumsden v. Fraser (p) is strongly in point. In that case the bill was filed against the defendant for an account of the rents and profits of three different estates in his possession, which had been the subject of three separate contracts for sale; and the objection taken by the demurrer was, that the purchasers of those estates were not parties to the suit; and the demurrer, which was to the whole

⁽k) Lumsden v. Fraser, 1 M. & C. 589, 602.

⁽l) 1 M. & K. 189.

⁽m) For more on the subject of demurrers for want of parties, vide ante, p. 334; and as to amendment of bill

after demurrer allowed, vide post, p. 656.

⁽n) 3 Swanst. 142, n.

⁽o) Astley v. Fountaine, Finch, 4; Attwood v. Hawkins, ib. 113; Bressenden v. Decreets, 2 Ch. Ca. 197. (p) 1 M. & C. 589.

⁽¹⁾ See Story Eq. Pl. § 540.

bill, was allowed. If the principle insisted upon by the plaintiffs' To the Subcounsel, in The East India Company v. Coles, be correct, the demurrer in Lumsden v. Fraser should have been separately and specifically directed to each part of the bill covered by each con-

8. The subject of multifariousness has been discussed at some For multifalength in a former part of this Treatise (q) (1).

It may be observed here, that a demurrer for multifariousness Goes to the goes to the whole bill, and that it is not necessary to specify the whole bill. particular parts of the bill which are multifarious (r) (2). It ap-Charge of pears formerly to have been considered necessary that, as the decombination need not be fendants may combine together to defraud the plaintiff of his answered. rights, and such combination is usually charged by the bill, a defendant demurring for multifariousness must so far answer the bill as to deny combination (s) (3). This rule, however, appears not to be now acted upon (t). It is presumed, however, that the effect of an answer to such part of the bill as charges combination, would not have the effect of over-ruling a demurrer for multifariousness, provided it extends no further (u).

9. The length of time which has elapsed since the plaintiff's For length of claim arose, has not hitherto been classed amongst the causes of time. objection to a bill of which the defendant may avail himself by demurrer. It was formerly considered that length of time was a proper ground for a plea, and not for a demurrer; and in Gregor v. Molesworth (x), Lord Hardwicke, refused to allow a demurrer of this nature, alleging, as his reason, that several exceptions might take it out of the length of time, as infancy or coverture, which the party should have the advantage of showing, but which cannot be done if demurred to. This, however, can hardly be a sufficient reason for the distinction in this case be-

(q) Ante, Chap. VI. sect. 4. (r) East India Comp. v. Coles, 3

Swanst. 142, n.

(s) Ld. R. 181; and vide Bull v.
Allen, Bunb. 69; Powell v. Arderne, 1 Vern. 416; vide etiam, Lord Eldon's judgment in Lansdown v. El-

derton, 8 Ves. 526 [Sumner's ed. note (2) of Mr. Hovenden].

(t) Vide Brookes v. Whitworth, 1 Mad. 86. (u) Powell v. Arderne, 1 Vern.

(x) 2 Ves. 109. Vide etiam, Aggas v. Pickerell, 3 Atk. 225.

⁽¹⁾ See ante, 384, note; Story Eq. Pl. § 530-540; Graves v. Fresh, 9 Gill & John. 280; Bryan v. Blythe, 4 Blackf. 331; Coe v. Turner, 5 Conn. 86; Mulock v. Mulock, I Edw. 14; Thurman v. Shelton, 10 Yerger, 383.

⁽²⁾ See Dimmock v. Bixby, 20 Pick. 368, cited post, 651, note; Gibbs v. Clagett, 2 Gill & John. 14.

⁽³⁾ See Roth v. Butler, Vern. & Scriv. 85; Paul v. Fobes, ib. 376.

To the Substance of the Bill. Effect of Stat-

ute of Limita-

tions.

tween a plea and a demurrer, as the plaintiff, if he has any reason to allege to take his case out of the bar, arising from the length of time, may show it by his bill; and it appears to be clearly the rule of the Court, that the Statute of Limitations, or objections in analogy to it, upon the ground of laches, may be taken advantage of by way of demurrer as well as by plea (y) (1). It is to be observed, that, previously to Lord Hardwicke's time, demurrers had been allowed to bills to redeem mortgages on account of the length of time (z); and that, since that period, in Beckford v. Close (a), Lord Kenyon, when Master of the Rolls, sitting at the Cockpit upon an appeal, confirmed a decision which had been made by the Court in Jamaica, allowing a demurrer to a bill for redemption, on the ground of length of time. That the case was cited before Lord Alvanley, M. R., in Hardy v. Reeves (b), who said he had no doubt that a demurrer on the ground of length of time to a bill for redemption, would be good, if the bill was so

(y) Suits in Equity are not within the words of the stat. 21 Jac. 1. c. 16; but Courts of Equity have held themselves bound by it in respect of all legal titles and demands. Hovenden v. Ld. Annesley, 2 Sch. & Lef. 630, 631; Hony v. Hony, 1 S. & S. 568 (2). And in respect of equitable ti-tles and demands, they have been in-fluenced in their determinations by analogy to it. Bond v. Hopkins, 1 Sch. & Lef. 428; Hovenden v. Ld. Annesley, ubi supra; Stackhouse v. Barnston, 10 Ves. 466; Exp. Dewdney, 15 Ves. 496; Beckford v. Wade, 17 Ves. 97; Marquis of Cholmondeley v. Clinton, 2 J. & W. 1, 161, 2 J. & W. 192, S. C (2). By the stat.

3 & 4 W. IV. c. 27, however, suits in Equity for certain purposes, and, amongst others, for the redemption of mortgages, are expressly brought within its words. Sects. 24, 25, 26, 27, 40, 41, and 42. And where it appears on the face of the bill that the equity of the plaintiff is barred by this statute, there does not seem to be any reason why the objection should not be taken by demurrer. Bampton v. Birchall, 5 Beav. 67.

(2) Sanders v. Horeall, 5 Beav. 67.
(2) Sanders v. Hoare, 1 Ch. Rep. 184; Frazer v. Moor, Bunb. 54; Jenner v. Tracey, 3 P. Wms. 287.
(a) Cited 4 Ves. 476.
(b) 4 Ves. 466.

⁽¹⁾ If the lapse of the period of limitation appears with certainty on the face of the bill, the objection may be taken by demurrer. Deloraine v. Browne, 3 Bro. C. C. (Perkins's ed.) 633, Mr. Belt's note (1), 646, Mr. Eden's note (7), and cases cited; Wisner v. Barnet, 4 Wash. C. C. 631; Dunlap v. Gibbs, 4 Yerger, 94; Foster v. Hodgson, 19 Ves. 180; Hoare v. Peck, 6 Simons, 51; Story Eq. Pl. § 484, 751, and notes; Hardy v. Reeves, 4 Sumner's Vesey. 466, note (b); Freake v. Cranfeldt, 3 My. & Cr. 499; Tyson v. Pole, 3 Younge & Coll 266; Humbert v. Rector, &c. Trinity Church, 7 Paige, 195; Van Hook v. Whitlock, 7 Paige, 373; S. C. 94 Wendell, 587; Coster v. Murray, 5 John. Ch. 521; Waller v. Demint, 1 Dana, 92. See M'Dowl v. Charles, 6 John. Ch. 132. Dana, 92. See M'Dowl v. Charles, 6 John. Ch. 132.

⁽²⁾ See Acherley v. Roe, 5 Sumner's Vesey, 565, Perkins's note (b), and cases cited, 573, note (a), and cases cited; Stockhouse v. Barnston, 10 Sumner's Vesey, 453, Perkins's notes (c) and (d), and cases cited; Hardy v. Reeves, 4 Sumner's Vesey, 465, notes (a) and (b); Mitford Eq. Pl. by Jermy, 272, 273, (5th Am. ed.) note (1) and cases cited; Bangs v. Hall, 2 Pick. (2nd ed.) 372, note (1), and cases cited.

In Massachusetts, the statute of limitations operates, in cases where it

framed as to state such a case (1). In Deloraine v. Browne*(c), to the Subhowever, an attempt was made to take advantage of length of time by demurrer; and Lord Thurlow overruled the demurrer; but his Lordship's judgment in that case, did not meet with the concurrence of Lord Redesdale, who, in Hovenden v. Lord Annesly (d), expressed his disapprobation of it. The principle of allowing length of time to be taken advantage of by demurrer as well as by plea, has since been acknowledged and acted upon by the Court in Foster v. Hodgson (e), where a demurrer to a bill for an account was allowed (2), on the ground that no demand was stated

(c) 3 Bro. C. C. 633 [Perkins's ed. (e) 19 Ves. 180 [Sumner's ed. note notes]. (a) 2 Sch. & Lef. 607.

applies, ex proprio vigere, in Equity as well as at Law. Farnham v. Brooks, 9 Pick. 243; Johnson v. Ames, 11 Pick. 182; Bowman v. Wathen, 1 Howard (U. S.), 189.

In Kentucky, the statute of limitations is a bar in Equity. M'Dowell v. Heath, 3 A. K. Marsh. 223; Breckenridge v. Churchill, 3 J. J. Marsh. 15. It seems, however, that it does not apply in totidem verbis, but has been adopted as reasonable and consistent. Crain v. Prather, 4 J. J. Marsh. 77.

The principles of the statute of limitations, as applied to suits in Equity, are recognized by the Revised Statutes of New York. Before such recognition, they received the same application. Kane v. Bloodgood, 7 John. Ch. 90; Stafford v. Bryan, 1 Paige, 239; Bertine v. Varian, 1 Edw. 343. See 2 Rev. Stat. N.Y. 301, and Van Hook v. Whitlock, 3 Paige, 409 In N. York, aside from the Revised Statutes, the bar would seem to operate by the discretion of the Court. Murray v. Coster, 2 John. R. 583; Arden v. Arden, 1 John. Ch. 316. See the same doctrine held in Elmendorf v. Taylor, 10 Wheaton, 152; Coulson v. Walton, 9 Peters, 82, and see Robinson v. Hook, 4 Mason, 150.

In Connecticut, where a delay has been such as to be a bar at Law, it will be so in Equity. Banks v. Judah, 8 Conn. 145. The same principle exists in the Courts of the United States. Elmendorf v. Taylor, 10 Wheaton, 152; Miller v. M'Intyre, 6 Peters, 61.

In Maine, it is said that a Court of Equity will give full effect to the statute of limitations, as well as throw out stale demands and claims. Chapman v. Butler, 22 Maine, 191. Whether this applies to cases purely of equitable jurisdiction, see Robinson v. Hook, 4 Mason, 150; Murray v. Coster, 2 John. 583; Kane v. Bloodgood, 7 John. Ch. 90; Armstrong v. Campbell, 3 Yerger, 232; Bigelow v. Bigelow, 6 Ohio, 97.

In case of a direct trust, no length of time bars the claim between the trustee and cestus que trust. Cook v. Williams, 1 Green Ch. 209; Baker v. Whiting, 3 Sumner, 476; Armstrong v. Campbell, 3 Yerger, 201; Overstreet v. Bate, 1 J. J. Marsh. 370; Trecothick v. Austin, 4 Mason, 16, and other cases cited in Perkins's note (b) to Acherley v. Roe, 5 Sumner's Verger, 573

(1) A demurrer would undoubtedly lie to a bill for the redemption of a mortgage, after a great length of time had elapsed, if the bill were so framed as to prevent the objection without any attendant circumstances to obviate it. Story Eq. Pl. § 508, and cases in note

As to the length of time, which will bar a redemption of a mortgage, see Acherley v. Roe, 5 Summer's Vesey, 573, Perkins's note (a), and cases cited; Hardy v. Reeves, 4 Summer's Ves. 466, note (a); Trash v. White, 3 Bro. C. C. (Perkins's ed.) 291, note (a), and cases cited; Phillips v. Sinclair, 20 Maine, 269.

(2) Ante, 622, note.
In reference to the length of time which will bar a bill for an account, see

To the Sub- by the bill to have been made for twelve years; and in Hoare r. stance of the Peck (f) a similar demurrer was allowed by the V. C. of England, it appearing upon the face of the bill that the cause of suit did not arise within six years before the filing of it.

Can only hold a positive limitation of lien,

but not where question is only upon the fact whether the Court will infer acquiescence.

It is to be remarked here, that all the above cases were decided where there is upon the ground of their coming within the Statute of Limitations, of the 21 Jac. I. c. 16, or the rules of the Court which have been adopted by analogy to that statute, and that therefore there was a positive limitation of time upon which the Court could proceed; where, however, there is no such positive limitation of time, the question whether the Court will interfere or not, depends upon whether, from the facts of the case, the Court will infer acquiescence or confirmation or a release; such inference is an inference of fact, and not an inference of law, and cannot be raised on demurrer (g), because a defendant has no right to avail himself by demurrer of an inference of fact upon matters on which a jury in a Court of Law would collect matter of fact to decide their verdict, if submitted to them, or a Court would proceed in the same manner in Equity (h). A similar question has sometimes arisen concerning the Statute of Frauds, as to whether objections under that Act should be taken by plea or demurrer. According to Lord Langdale, M. R., in Field v. Hutchinson (i), there can be no doubt but that a bill may contain such statements as to entitle a · defendant by general demurrer to take advantage of the want of signature to an agreement, because it might appear clear that the plaintiff was not entitled to the relief he asked (2); it is, however, more usual to plead this statute, as it is seldom that the bill discloses every thing necessary for the defence.

> 10. Although there has been no positive decision upon the subject, there is no doubt that if it appears, by the bill, that there is another suit depending relating to the same matter, a defendant may demur (k). Such a demurrer, however, will not hold, unless it appears, by the bill, that the suit already depending will

(j) b Sim. 51. (g) Cuthbert v Creasy, Mad. & v. Okeover, 3 Sw. 421, n. Geld. 189. (h) Ld. R. 213.

Acherley v. Roe, 5 Sumner's Vesey, 565, Perkins's note (b), and cases cited; Stackhouse v. Barnston, 10 ib. 453, note (d), and cases cited.

(2) Story Eq. Pl. § 503; Meach v. Stone, 1 D. Chip. 182.

In a suit for specific performance of a contract in relation to land, if the agreement appears in the bill to be by parol, and no facts are alleged to take the case out of the statute of frauds, the defendant may demur to the bill. Cozine v. Graham, 2 Paige, 177. See ante, 407, note.

afford to the plaintiff the same relief as he would have been entitled For Matters of to under the bill which is the subject of the demurrer (1).

With respect to demurrers by reason of the deficiency of the Demurrer to bill, in matters of form, the grounds upon which they may be put the form of the bill. in have been so amply stated before, that all which is necessary in this place is summarily to recall them to the reader's attention (1). They are as follows:—1. Because the plaintiff's place of abode is not stated (m). 2. Because the facts essential to the plaintiff's right, and within his own knowledge, are not alleged positively (n). 3. Because the bill is deficient in certainty (o). 4. Because the plaintiff does not by his bill offer to do equity where the rules of the Court require that he should do so (p), or to waive penalties or forfeitures where the plaintiff is in a situation to make such waiver (q). To these may be added, 5, the want of counsel's signature to the bill (r); and 6, the absence of the proper affidavit in those cases in which the rules of the Court require that the plaintiff's bill should be accompanied by such an instrument (s) (2).

The grounds of demurrer before pointed out apply to the relief Demurrers to prayed by the bill, and not to the discovery further than as it is incidental to the relief. It has, however, been stated that there are cases in which a defendant may demur to the discovery sought by the bill, although such a demurrer will not extend to preclude the plaintiff from having the relief prayed, provided he can establish his right to it by other means than a discovery from the defendant himself. These cases chiefly occur where there is any Different sorts thing in the situation of the defendant which renders it improper of. for a Court of Equity to compel a discovery, either because the

(l) Law v. Rigby, 4 Bro. C. C. 60. Vide post, Chap. Of Pleas.

(m) Ante, p. 408, 409. (n) Ib. p. 409.

⁽o) Ib. p. 421, 424.

⁽p) Ib. 441.

⁽q) Ib. 443. (r) Ib. 357; [1 Hoff. Ch. Pr. 97.] (s) Ib. p. 449.

⁽¹⁾ Story Eq. Pl. § 528, 529, and notes; Mitford Eq. Pl. by Jeremy, 206. A demurrer will not hold to an irregularity of practice in regard to the bringing or filing of a bill, suggesting matters of fact which do not otherwise appear by the bill. Tallmadge v. Lovett, 3 Edw. 563.

⁽²⁾ The defendant is not bound to look beyond the copy of the bill, which is served on his solicitor; and if that does not contain the requisite affidavit or verification to give the Court jurisdiction of the case, he may demur to

the bill on that ground. Lansing v. Pine, 4 Paige, 364.

(3) A demurrer will be allowed to a bill of discovery in aid of the defence to a suit in a foreign Court. Bent v. Young, 9 Simons, 180. But see contra, Mitchell v. Smith, 1 Paige, 287.

To the discovery.

discovery may subject the defendant to pains and penalties, or because it may subject him to some forfeiture, or to something in the nature of a forfeiture. A defendant may also demur to any part of the discovery sought by the bill, which is immaterial to the relief prayed; he may likewise protect himself, by demurrer, from a disclosure of matters which are the subject of professional confidence, or which may lead to a disclosure of his own title in cases where there is not sufficient privity between him and the plaintiff to warrant the latter in requiring a disclosure of it.

That it will exto penalty or forfeiture.

I. We have before seen that in cases where the plaintiff is the pose defendant person who is entitled to the advantage of the penalty (1), or of the forfeiture to which the defendant would render himself liable by making the discovery sought, he may obviate a demurrer by expressly waiving his right to the penalty or forfeiture in his bill, the effect of which waiver is to enable the defendant, in case the plaintiff should sue him for the penalty, or endeavor to take advantage of the forfeiture, to apply to the Court for an injunction to restrain him from proceeding (u). But where the forfeiture or penalty is not of such a nature that the plaintiff can by a waiver relieve the defendant from the consequence of his discovery, a demurrer will hold (1). For it is a general rule, that we one is bound to answer so as to subject himself to punishment, in whatject himself to ever manner that punishment may arise, or whatever may be the nature of that punishment, whether it arises by the Ecclesiastical Law or by the law of the land (x) (2). This rule is not confined to cases in which the discovery must necessarily subject the defendant to pains and penalties, but it extends to cases where it may do so (3). If, therefore, a bill charges any thing which, if

Where it cannot be waived.

Rule that no one is compelled to subpunishment,

(t) Ante, p. 443.

(ú) Ib. p. 443.

Ves. 243, 244; Harrison v. South-cote, 1 Atk. 528, 539. Vide etiam,

the cases there referred to, notis, and Parkhurst v. Lowten, 2 Swanst. 214; (z) Brownsword v. Edwards, 2 Hare on Discovery, 131-132, where 22, 243, 244; Harrison v. South-the cases are classed.

confessed by the answer, may subject the defendant to a criminal

⁽¹⁾ Story Eq. Pl. § 575; March v. Davison, 9 Paige, 580; Mitford Eq. Pl. by Jeremy, 194, 195; 2 Story Eq. Jur. § 1494.

(2) Wigram, Discovery, (1st Am. ed.) 82, 83, 193, § 127, 134, 270-272; Brownell v. Curtia, 10 Paige, 213; Livingston v. Harris, 3 Paige, 528; Patterson v Patterson, 1 Hayw. 167; Wolf v. Wolf, 2 Harr. & Gill, 382; Lambert v. People, 9 Cowen, 578; Northup v. Hatch, 6 Coun. 361; Leggett v. Postley, 2 Paige, 599; Story, Eq. Pl. § 521-524, 575-598; United States v. Twenty Eight Packages, &c. Gilpin 306; Butler v. Catlin, 1 Reot, 310; Leigh v. Everhart, 4 Monroe, 381; Ocean Ins. Co. v. Field, 2 Story C. C. 59.

But a party is bound to make discovery, although his answer may subject him to the loss of legal interest. Taylor c. Mitchell, 1 How. (Miss.) 596. (3) Story Eq. Pl. § 575.

prosecution (y) or to any particular penalties, as an usurious contract (z), maintenance (a), champerty (b), simony (c), or subornation of perjury (d), the defendant may, by demurrer, protect himself from the discovery (1). In the application of this principle it has been held, that a married woman will not be compelled to answer a bill which would subject her husband to a charge of felony (e) (2).

To the Discovery.

It is not necessary to the validity of an objection of this nature, Extends to that the facts inquired after have an immediate tendency to crimi-protect defendant from disnate the defendant; he may equally object to answering the cir-covery of all cumstances, though they have not such an immediate tendency (f) circumstances tending to (3). This was very clearly laid down by Lord Eldon, in Paxton criminate.

- (y) E. I. Company v. Campbel, 1 Ves. 246; Chetwynd v. Lindon, 2 Ves. 450; Cartwright v. Green, 8 Ves. 405; Claridge v. Hoare, 14 Ves. 65; Maccallum v. Turton, 2 Y. & J. 183.
- (z) Earl of Suffolk v. Green, 1 Atk. 450; Chauncey v. Tahourden, 2 Atk. 393; 22 Vin. Ab. Usury, Q. 4; Whitmore v. Francis, 8 Price, 616.
- (a) Penrice v. Parker, Rep. Temp. Finch, 75; Sharp v. Carter. 3 P. Wms. 375; Wallis v. Duke of Port-

land, 3 Ves. 494; The Mayor of London v. Ainsley, 1 Anst. 158.

(b) Hartley v. Russell, 2 S. & S. 252.

(c) Attorney-general v. Sudell, Prec. in Ch. 214; Parkhurst v. Low-

ten, 1 Mer. 391, 401.
(d) Selby v. Crew, 2 Anst. 504;
Baker v. Pritchard, 2 Atk. 388.

(e) Cartwright v. Green, 8 Ves. 405; ante p. 194.
(f) E. I. Company v. Campbel, 1 Ves. 247; see also Lee v. Read, 5 Beav. 381.

The objection by the defendants, who were officers of a corporation, that a discovery of the matters stated in the bill may subject the corporation to a forfeiture of its charter, is not sufficient to support a general demurrer to the relief as well as to the discovery sought by the hill. Robinson v. Smith,

3 Paige, 222.

(2) Cartwright v. Green, 8 Sumner's Vesey, 405a, note (c), and cases cited; Story Eq. Pl. § 519.

(3) A defendant will not be compelled to discover that which, if answer-(3) A detendant will not be compelled to discover that which, it answered, would tend to subject him to a penalty or punishment, or which might lead to a criminal accusation, or to ecclesiastical censure. I Greenl. Ev. § 451; Thorpe v. Macauley, 5 Madd. 229; Maccallum v. Turton, 2 Younge & J. 138; Story Eq. Pl. § 524, 577, 591-598, 824, 825; Leggett v. Postley, 2 Paige, 599; Patterson v. Patterson, 1 Hayw. 163; Wolf v. Wolf, 2 Harr. & Gill, 322; Lube, Eq. Pl. (Am. ed.) 246; M'Intyre v. Mancius, 16 John. 592; Sloman v. Kelley, 3 Younge & C. 573; Ocean Ins. Co. v. Fields, 2 Story C. C 59; Bishop of London v. Fytche, 1 Bro. C. C. (Perkins's ed.) 96 and notes.

In case of witnesses, it is said that "many links frequently compose that chain of testimony, which is necessary to convict an individual of a crime, but no witness is compellable to furnish any one of them against himself."

⁽¹⁾ In Livingston v. Tompkins, 4 John. Ch. 432, it is said that "there are numerous cases establishing the rule that no one is bound to answer so as to subject himself, either directly or eventually, to a forfeiture or penalty, or any thing in the nature of a forfeiture or penalty." See the cases there cited; Story Eq. Pl. § 583; Northup v. Hatch, 6 Conn. 361; Skinner v. Judson, 8 Conn. 528; Wolf v. Wolf, 2 Harr. & Gill, 382; Livingston v. Harris, 3 Paige, 528; United States v. Twenty-Eight Packages, Gilpin, 306.

To the Discovery.

v. Douglas (g), in which his Lordship said. "In no stage of the proceedings in this Court can a party be compelled to answer any question, accusing himself, or any one in a series of questions that has a tendency to that effect: the rule in these cases being, that he is at liberty to protect himself against answering, not only the direct question, whether he did what was illegal, but also every question fairly appearing to be put with the view of drawing from him an answer containing nothing to affect him, except as it is one link in a chain of proof that is to affect him" (1). defendant, however, although he is not compellable to answer whether he has committed an act of bankruptcy (2), because by so doing he lays himself open to the penal consequences of the Bankrupt Law, cannot protect himself from a discovery, whether he traded or not, although before a man can be bankrupt he must be a trader (h).

Defendant must answer. whether he was a trader. though not as to act of bankruptcy.

Rule extends to cases of moral turpitude, which expose to punishment in Ecclesiastical Court.

It results from the principle above laid down, that a defendant is not bound to make any discovery which may tend to show himself to have been guilty of any moral turpitude, which may expose him to ecclesiastical censure; thus it has been held that a defendant is not bound to discover whether a child was born out of lawful wedlock (i), nor is an unmarried woman bound to discover whether she and the plaintiff cohabited together (k). been held, however, that a woman is bound to discover where her child was born, though it might tend to show the child to be an alien (1) (3). It has also been held, that though parties may demur to any thing which may expose them to ecclesiastical censure, a defendant cannot protect himself from discovery whether he has or has not a legitimate son (m); and it is to be observed, that the objection to answering, upon the ground that the answer might show a defendant to be guilty of moral turpitude, appears to be confined to those cases where the moral turpitude is of such a

⁽g) 19 Ves. 225. Vide etiam, Maccallum v. Turton, 2 Y. & J 183; Claridge v. Hoare, 14 Ves. 59; Thorp v. Macauley, 5 Mad. 220.

⁽h) Chambers v. Thompson, 4 Bro. C. C. 434.

⁽i) Attorney-general v. Duplessis, Parker, 163.

⁽k) Franco v. Bolton, 3 Ves. 370. l) Attorney-general v. Duplessis, ubi supra.

⁽m) Finch v. Finch, 2 Ves. 491.

Marshall, C. J. 1 Burr's Trial, 244; The People v. Mather, 4 Wendell, 229; Southard v. Rexford, 6 Cowen, 254; Bellinger v. The People, 8 Wendell,

⁽¹⁾ Story Eq. Pl. § 552, 577, 591, et seq.; Lee v. Read, 5 Beavan, 361; Paxton v. Douglass, 19 Vesey, 228.
(2) Story Eq. Pl. § 584.
(3) See Story Eq. Pl. § 586, and note.

nature as would lay the party open to proceedings in the Ecclesi- To the Disastical or other Courts. In other cases, a defendant is bound to answer fully, notwithstanding his answer may cast a very great In other cases degree of reflection on his moral character (n) (1). Therefore, defendant must answer, where a defendant demorred to such part of the bill as sought a though discovdiscovery from her, as to a conspiracy or attempt to set up a bastard ery may reflect child, which she pretended to have by a person who kept her, and character. was desirous to have a child by her, the demurrer was overruled (o), because the conspiracy or attempt to set up the bastard, not being alleged to have been for the purpose of defeating the heir, was not of itself an offence. It is also to be observed, that though Not in cases a discovery may subject a defendant to penalties to which the dant has coveplaintiff is not entitled, and which he consequently cannot waive, nanted not to yet if the defendant has expressly covenanted not to plead or de-demur. mur to the discovery sought, he will be compelled to answer (2). Thus where the defendant was a supercargo of a ship belonging to the South Sea Company, who, on his appointment, had entered into a bond with sureties of 5,000%, penalty, not to trade to any of the places prohibited by a certain Act of Parliament and treaty of peace between this country and Spain, catled the Assiento Contract, and had covented not to demur or plead to any bill which should be brought against him in Equity for a discovery as to his trading or dealings contrary to his agreement; upon a bill being brought, charging him with several breaches of his covenant, to the prejudice of the plaintiffs, and for a discovery, &c., waiving the penalty of the bond, the defendant pleaded the statute 9 Anne, and several articles of the Assiento Contract, (whereby whoever traded contrary thereunto were liable to great penalties, such as confiscation of ship and goods, and other forfeitures,) and insisted that he was not bound to discover matters which might subject him to such forfeitures; and it was held, that since the defendant had expressly covenanted not to plead or demur to a discovery, he should not be allowed to object, to the covenant which he had entered into, by his plea (p). It has also been decided, that if a

upon his moral

⁽a) Per Lord Eldon, in Parkhenst
v. Lowten, 1 Mer. 400.
(b) South Sea Company v. Bumsted, 1 Eq. Ca. Ab. 77; E. I. Company v. Atkin, cited ib. 1 Stra. 168.

450. (n) Per Lord Eldon, in Parkheunt v. Lowten, 1 Mer. 400.

⁽¹⁾ A party may be compelled to make discovery of any act of moral turpitude, which does not amount to a public offence or an indictable crime. Story Eq. Pl. § 595, 596; Hare, Discov. 142; Macauley v. Shackwell, 1 Bligh, N. S. 121; S. C. 2 Russ. 550, note; Glynn v. Houston, 1 Keen, 229. (2) Story Eq. Pl. § 589.

To the Discoverv. Does not extend to cases

in which deself to a payalty.

person by his own agreement subjects himself to a payment in the nature of a penalty, if he does a particular act, a demurrer to a discovery of that act will not hold (q) (1). Thus where a lessee covenanted not to dig loam, clay, sand, or gravel, except for buildfendant agrees ing, on the land demised, with a proviso that if he should dig any to subject him- of those articles for any other purpose he should pay to the lessor ment in the na. 20s. a cart load, and he afterwards dug great quantities of each ture of a pen- article; upon a bill being filed by the lessor for a discovery of the quantities, waiving any advantage of possible forfeiture of the term, a demurrer by the lessee, because the discovery might subject him to a payment by way of penalty, was overruled (r). Upon the same principle, where defendants in the situation of servants to a public company, have bound themselves to pay, or to permit the company to deduct or retain in account, a specified sum in case of a breach of the regulations of their service, they will not be permitted to protect themselves from answering as to the breaches of such regulations, because the payment to which they have subjected themselves is in the nature of a penalty (s). It should also be mentioned, that there are cases in which the

Do not apply a higher objection to make the discovery than the covenant of the de-

fendant to

withhold it.

defendant has not been allowed to protect himself from discovery, on the ground that he might thereby render himself liable to punishment or penalties, even though he has not entered into any covenant not to demur to such discovery. Thus, in Green v. where there is Weaver (t), where a broker of the city of London, who was charged with fraud, in giving fictitious names as those of the vendors of merchandize which he had purchased for the plaintiff, and in making a secret profit beyond his brokerage, objected to answer, on the ground that he had given a bond, and taken an oath to perform the duties of his office, of which the alleged transaction would be a breach; and the partners of the broker, who were also defendants, alleged that they had not been admitted as brokers, and relied, as an excuse for not answering, on the penalties imposed by statute on persons so acting; Sir A. Hart, V. C., held, that the defendants were bound to answer, on the ground that, by holding themselves out as brokers, and thereby inducing the plain-

⁽q) Lord Red. 196; Morse v. Buckworth, 2 Vern. 443; E. I. Company v. Neave, 5 Ves. 173.

⁽r) Richards v. Cole, or Brodrepp v. Cole. In Cha. Hil. Vacation,

^{1779.} 

⁽s) African Company v. Parish, 2 Vern. 244; E. I. Company v. Neave, ubi supra.

⁽t) 1 Sim. 404.

⁽¹⁾ Story Eq. Pl. § 590, and note.

tiff to place confidence in them as such, they had contracted an To the Disobligation of a higher kind than one under a covenant not to protect themselves from a discovery; and that, if the defendants were Brokers. not bound to answer, they might render those Acts of Parliament, which were framed for the purpose of protecting principals from the dishonesty of their agents, perfectly nugatory (1).

His Honor also observed, that if a Court of Equity were to give Executors. effect to a defence so constituted, he did not know that there could be any reason why an executor or administrator, who had made oath duly to administer the assets, and executed a bond for • that purpose, might not allege those matters in answer to a bill of discovery, charging him with fraudulently rendering an account of the assets.

From the observations of Lord Langdale, M. R., in Lee v. Right of pro-Reed (u), it would appear that a defendant is entitled by Law to be waived. the protection of the Court against a discovery, tending to establish a criminal charge; and that this right is such, that he cannot deprive himself of the benefit of it by any agreement whatever.

The rule that a defendant is not bound to answer in cases which Exception to may subject him to punishment or penalties, appears to be liable general rule in to modification, in some cases, where the facts charged in the bill of conspiracy. would amount to conspiracy; and also, in certain cases where the defendants would appear to be guilty of fraud, or of publishing a libel which might be the subject of indictment (2).

certain cases

It has been before stated (x), on the authority of a case in the Exchequer (y), that an answer to a charge of unlawful combination cannot be compelled. This is principally on the ground. that such a combination would amount to a conspiracy, which is an indictable offence (3). In Dummer v. Corporation of Chippenham (z), however, Lord Eldon, with reference to a demurrer upon that ground, said, "I am perfectly satisfied, that by allowing the demurrer, I should destroy the jurisdiction; as without the ordinary words, charging the parties with combining and confed-

⁽w) 5 Beav. 385.

⁽y) Oliver v. Haywood, 1 Anst. 82.(z) 14 Ves. 245, 251.

⁽z) Ante, p. 427.

⁽¹⁾ See Story Eq. Pl. § 589.

⁽²⁾ See Wilmot v. Maccabe, 4 Simons, 263; Story Eq. Pl. § 597. In March v. Davidson, 9 Paige, 580, Mr. Chancellor Walworth held, that in the case of a libel, the defendant could not be compelled in a bill of discovery to discover any thing which would make him liable to an indictment criminally; but he was compellable to discover other facts in support of the action, which would not subject him to a criminal prosecution, or to a pen-

alty or forfeiture. (3) Story Eq. Pl. § 578.

To the Discovery.

Exception in cases of fraud.

erating, in nine cases out of ten, from all time past, they would, upon modern doctrine, be liable to indictment; vet Courts of Equity have been constantly compelling a discovery (a)." there is no doubt that, in many cases of fraud, Courts of Equity have compelled a discovery where the fraud was of such a nature, that the defendants might have been liable to a criminal procecution; as in the cases mentioned by Lord Eldon, in Macauley v. Shackell (b), as having frequently occurred in the Court of Exchequer, in which it was the practice with underwriters, where policies of insurance were found to be affected with gross frauds, to bring the parties into Court, and compel them to answer, by stating in their bills frauds which would have been indictable.

It may be mentioned here, that the legislature has, in some

cases, expressly provided, that parties to transactions rendered

Or where the legislature provides that defendant shall answer, notwithstanding penalties.

As under Stock Jobbing Act.

illegal by statute, shall be compelled to answer bills in Equity for the discovery of such transanctions; in such cases, of course, the defendant cannot protect kimself from the discovery required, on the ground that it will render him liable to the penalties imposed by the statute itself. Thus, if a bill is filed for a discovery, as to transactions which would render the defendant liable to penalties under the 7 Geo. IV. c. 8, commonly called the "Stock Jobbing Act," the defendant cannot protect himself from such discovery, because, by the second section of the Act, a party is bound to an-

Or under Acts to prevent gaming;

It is to be observed, that the statute 9 Ann. c. 14, ss. 3, 4, for the prevention of gaming, also gives the power of compelling a discovery of money won at play, and takes away the penalty as against a party who shall make discovery and repayment (1): but

swer any bill that may be filed in a Court of Equity (c) (1).

(a) Vide etiam, his Lordship's observation in Mayor of London v. Levy, 8 Ves. 404, and Hare on Discovery, 143; [Niles v. Anderson, 4 How-

ard (Miss.) 365.]
(b) 1 Bligh, N. S. 96.
(c) Bancroft v. Wentworth, 3 Bro. C. C. 11 [Perkins's ed notes]. It is to be observed that, under that Act, the defendant will not be protected from the discovery, unless the case comes within the first section of it; and that the defendants are at liberty to avoid discovery, in cases which come within the 5th and 5th sections. Bullock v. Richardson, 11 Ves. 375, and ante, p. 433; Billing v. Flight, 1 Mad. 230.

⁽¹⁾ The New York Revised Statutes, and a statute passed since, have provisions which compel a defendant to make a discovery in many cases where criminal prosecutions and penalties can take place and be executed. Thus the defendant must answer to a gaming transaction at the suit of the loser or any other person. 1 Rev. Etat. 664, § 19. As to money illegally received for brokerage, ib. 709, § 4. As to money and things taken usunously, ib. 772, § 6. And also in all cases where the defendant is charged with being a party to a fraudulent conveyance. New York Laws of 1833, p. 17. In all these cases, however, the effect of the discovery is specially limited, by statute to the object of the civil proceedings in research to which limited, by statute, to the object of the civil proceedings, in regard to we it is sought. Graham on Jurisdiction, 493.

it has been held, that this statute does not extend to compel a discovery in aid of an action by a common informer, but only in aid of the party by whom the money is lost, so that a demurrer, on the ground that the discovery will expose the defendant to the penalties of that act, will lie (d).

If a party be liable to a penalty or forfeiture, provided he is sued where the within a limited time, and the suit is not commenced till after the time within which the penlimitation has expired, the defendant will be bound to answer alty may be fully, even though, by so doing, he may expose his character and recovered, has conduct to reflection (e) (1); and it seems that the plaintiff is entitled to an answer, if the liability ceases after the defence has been put in, and before it is heard, even though there was a liability at the time of putting in his defence. Thus, where a defendant pleaded a statute giving penalties upon the acts with which he was charged, and the time of suing for the penalties expired before the hearing of the plea, the plea was overruled (f); and so where the time for suing for penalties to the Crown had elapsed after exceptions had been taken to the first answer, and before the second answer came in, the reason of the protection failed; the Court held, that the defendant was bound to answer fully (g); and although the above questions arose, in one instance, upon a plea, and in the other, upon exceptions to an answer, there is no doubt that the same decisions would be come to, in case the objection to answering were to be taken by demurrer.

expired.

It has been before stated, that if the executor or administrator Where bill by of a parson bring a bill for tithes, he need not offer to accept the personal represingle value (h), the reason of which rule is, that the treble value person entitled is not given, by the statute, to the representatives, and there can to the penalbe no doubt that the same reason will be valid against allowing a demurrer in all cases where the penalty is personal, and does not survive to the representatives of the person entitled to sue for it (i).

Some of the cases in which a demurrer will lie to a bill, on the ground that the discovery required will expose the defendant to a

(e) Parkhurst v. Lowten, 1 Mer. 400.

(h) Ante, p. 444.(i) Vide Hare on Discovery, 148.

⁽d) Orm v. Crockford, 13 Price, 376; see the case of Sloman v. Kelly, 3 Y. & C. 673; and 4 Y. & C. 169, Ex. R.

⁽f) Corporation of Trinity House v. Burge, 2 Sim. 411. (g) Williams v. Farrington, 3 Bro. (g) Wi

⁽¹⁾ Story Eq. Pl. § 598; Skinner v. Judson, Conn. 528. But see Northup v. Hatch, 6 Conn. 361; Lambert v. People, 9 Cowen, 578.

forfeiture, have been before referred to (k), for the purpose of

To the Discoverv. Where discovery subjects

defendant to

forfeiture.

illustrating the principle, that where it is in the power of a defendant to waive such forfeiture, his omission to do so may be taken advantage of by demurrer (1); the bill, however, will be equally liable to this species of objection in cases where the plaintiff has no power to waive the effects of the discovery, as in those where he has such power and omits to exercise it. Therefore, where the discovery sought by an information would have subjected the defendants to a quo warranto, a demurrer was allowed (1) (2); and so if a bill should be filed to set aside an usurious contract, a defendant may demur to the discovery of what interest he agreed to take, because he cannot set that forth without disclosing any interest he has taken (m) (3). In like manner where a legacy was given to a woman, on her marriage, with a condition, that if she married without the consent of the trustees under the will, the legacy was to be forfeited; and a bill was filed against the legatee for a discovery whether any marriage had taken place, in which it was alleged she had married without consent, Lord Hardwicke allowed the demurrer, as she could not answer to the marriage without showing, at the same time, that it was against consent (a). It is to be observed that, in a case of this nature, where the husband and wife put in separate answers, under an order for that purpose, and the husband, by his answer, admitted the marriage without consent, but the wife omitted to do so, Lord Talbot, upon exceptions being taken to her answer, said, that he could not reconcile himself to compelling a wife to confess that by which she might forfeit all she had in the world, and held the answer to be sufficient (o) (4).

In cases of usury.

Of forfeiture upon marriage without consent.

> The case of Attorney-general v. Lucas (p) was an information under the 4 Geo. IV. c. 76. It charged the husband with procuring his marriage with a minor by falsely swearing that the consent of her parent had been given, and prayed the forfeiture of his interest in the wife's property, and a settlement of the same upon her and her issue. It was contended that the husband was bound

Of informations for forfeiture under statute.

> (k) Ante, p. 443. (l) Attorney-general v. Reynolds, 1 Eq. Ca. Ab. 131, pl. 10. (m) Per Ld. Hardwicke, in Chaun-

Wms. 336; ante, p. 194. (p) 2 Hare, 566.

cey v. Tahourden, ubi supra; Earl of Suffolk v. Green, 1 Atk. 450.

⁽n) Chancey v. Fenhoulet, 2 Ves. 265; Chauncey v. Tahourden, 2 Atk. 392, S. C.
(a) Wrottesley v. Bendish, 3 P.

Story Eq. Pl. § 580, 581; Lansing v. Pine, 4 Paige, 639.
 Smith Ch. Pr. (2nd Am. ed.) 203, note (f).

⁽³⁾ Story Eq. Pl. § 582. (4) Story Eq. Pl. § 579, and notes.

to answer to this information, and that the rule that a defendant To the Disshall not be compelled to answer with respect to circumstances which might occasion a loss or forfeiture of property, applies only where that forfeiture is to be enforced at Law. Sir J. Wigram, V. C., however, decided that there was no such distinction, and the defendant's answer was held sufficient.

It is to be remarked, however, that the rate applies only to cases Rule does not where a forfeiture, or something in the nature of a forfeiture, may discovery only be incurred: where the discovery sought merely extends to the occasions the performance of a condition, spon failure in which a limitation over taking effect of a limitation is to take effect, the defendant cannot protect himself from the over, discovery (1). Thus where a husband, by will, gave an estate to his wife, whilst she continued his widow, with a limitation over in case of her second marriage, and the remainder-man brought a bill against her in which he sought a discovery of her second marriage, upon the defendant demurring to the discovery, as subjecting her to a forfeiture, Lord Taibot overruled the demurrer (q). A demurrer, also, will not prevail where the discovery is of a matter which shows the defendant disqualified from having any interest or title: as whether a person claiming a real estate under a devise, be an alien, and consequently of taking by purchase (r). A distinction, however, appears to exist, in this respect, between where personal incapacities which are the result of general principles of Law, and disqualificathose which are imposed by the legislature, by way of penalty or nature of a forfeiture: thus, before the repeal of the statutes imposing disabilities upon persons professing the Popish religion (s), it was held, that a defendant was not obliged to discover whether he was a Papist or not (t). Upon the same principle, it has been held, that where a bill sought a discovery, whether a clergyman had been presented to a second living which avoided the first, under the statute 21 Hen. VIII., a demurrer to the discovery of that fact would lie; because the incapacity of holding the first living incurred by the acceptance of the second, was in the nature of a penalty imposed by the statute (u).

II. If a defendant has, in conscience, a right equal to that

(u) Boteler v. Allington, 3 Atk. 453.

⁽q) Cited Chauncy v. Tahourden, ubi supra; Chancey v. Fahourden, ubi supra; Chancey v. Fenhoulet, 2 Ves. 265; Lucas v. Evans, 3 Atk. 260; Monnins v. Monnins, contra, 2 Ch. Rep. 68.

(r) Attorney-general v. Duplessis, Parker, 144.

⁽s) 11 & 12 Will. III. c. 4, s. 4. (t) Smith v. Read, 1 Atk. 596; Harrison v. Southcote, 1 Atk. 528; 2 Ves 389, S. C.

⁽¹⁾ See to this distinction, Story Eq. Pl. § 579, note.

To the Discovery. Rule where defendant has in conscience an equal right

with plaintiff.

claimed by a person filing a bill against him, though not clothed with a perfect legal title, a Court of Equity will not compel him to make any discovery which may hazard his title (1); and if the matter appear clearly on the face of the bill, a demurrer will hold (z); the most obvious case is that of a purchaser for a valuable consideration, without notice of the defendant's claim (y) (2). Upon the same ground, a jointress may, in many cases, demur to a bill filed against her for a discovery of her jointure deed, if the plaintiff is not capable of confirming, or the bill does not offer to confirm, her jointure, and the facts appear sufficiently upon the face of the bill; though, ordinarily, advantage is taken of this defence by plea (z).

Where discovery sought is immaterial.

III. A defendant is not compellable to discover any thing immaterial to the relief prayed by the bill (3). Upon this ground, upon a bill filed by a mortgagor against a mortgagee to redeem, and seeking a discovery whether the mortgagee was a trustee, a demurrer to the discovery was allowed; for, as there was no trust declared upon the mortgage deed, it was immaterial to the defendants whether there was any trust reposed in the defendants or not (a). So where a bill was filed by the lord of a borough, pray-

Legh, 4 Mad. 193.

(y) Jerrard v. Saunders, 2 Ves. J. 458; Sweet v. Southcote, 2 Bro. C. C. 66 [Perkins's ed. note (a); Hoare

v. Parker, 1 ib. 581, note (a)].
(z) Lord Red. 200; Chamberlain
v. Knapp, 1 Atk. 52; Senhouse v.
Earl, 2 Ves. 450; vide etiam, Leech

(z) Lord Red. 199; vide Glegg v. v. Trollop, ib. 662; from which it appears, that a widow is not bound to discover her jointure deed, by her answer (even where the bill offers to confirm it,) till the confirmation has been effected; see post, Ch. on Production of Documents.

(a) Harvey v. Morris, Rep. T. Finch, 214.

(1) Story Eq. Pl. § 603-604 a.

sought. Lucas v. Bank of Darien, 2 Stew. 280; Leggett v. Postley, 2 Page, 601; Mitford Eq. Pl. by Jeremy, 191, 192; Graham on Jurisdiction, 482–490; Hare, Discov. 8; Wigram, Dis. (Am. ed.) 158, et seq.; Story Eq. Pl.

⁽¹⁾ Story Eq. Pl. § 603-604 a.

(2) The protection which Equity throws around an innocent purchaser, applies not only to bills of relief, but also to bills of discovery. 2 Story Eq. Jur. § 1502. Equity will not take the least step against him, and will allow him to take every advantage which the law gives him; for there is nothing which can attach itself upon his conscience, in such a case, in favor of an adverse claim, ib. § 1505; 1 ib. § 410; Wood v. Mann, 1 Sumner, 507; McNeil, v. Magee, 5 Mason, 269; Vattier v. Hinde, 7 Peters, 252; Fitzsimmons v. Ogden, 7 Cranch, 2; Boone v. Chiles, 10 Peters, 177; Payne v. Compton, 2 Younge & C. 457; Story Eq. Pl. § 603. And so a purchaser, with notice from an innocent purchaser without notice, is entitled to the like protection. For otherwise, it would happen that the title of such a boxa fide with notice from an innocent purchaser without notice, is entitled to the last protection. For otherwise, it would happen that the title of such a bons fide purchaser would become unmarketable in his hands. 2 Story Eq. Pl. Jur. § 1503a; ib. 410, and cases cited; Varick v. Briggs, 6 Paige, 323; Bennett v. Walker, 1 West, 130; Jackson v. McChesney, 7 Cowen, 360; Jackson v. Henry, 10 John. 185; Jackson v. Ewer, 8 John, 573; Demarest v. Wyncoop, 3 John. 147.

(3) The plaintiff in a bill must show the materiality of the discovery sought Lucas v. Bank of Darien. 2 Stow. 280: Leggett v. Postley, 2 Paige.

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covery.

ing, amongst other things, a discovery whether a person applying to be admitted a tenant was a trustee or not, a demurrer by the defendant was allowed (b); and where a bill was brought for a real estate, and sought a discovery of proceedings in the Ecclesiastical Court upon a grant of administration, the defendant demurred to that discovery, the proceedings in the Ecclesiastical Court being immaterial to the plaintiff's case (c). In like manner, where a bill was filed to establish an agreement entered into before marriage, by which a separate estate was secured to the defendant's wife, and praying a discovery of several unkindnesses and hardships which the defendant, as it was pretended, had used towards his wife, to make her recede from the agreement, and the defendant demurred to the discovery, the demurrer was allowed (d). But in general, if it can be supposed that the discovery may in any way be material to the plaintiff, in the support of his suit, the defendant will be compelled to make it (1): thus, where a bill called for a discovery of cases laid before counsel, and their opinion, a demurrer to the discovery was overruled, because Lord Eldon was of opinion that although the plaintiff had no right to a discovery of the advice which the defendant had received from his counsel, and the defendant might, on that ground, have demurred to so much of the bill as sought for a discovery of the opinions of counsel, yet as he had demurred to the discovery of the cases, to which the plaintiff was entitled, he was bound to overrule the demurrer as covering too much (e).

IV. The last case brings us to the consideration of those causes On the ground of demurrer to discovery, which are the consequence of the privi- of professional confidence. lege resulting from professional confidence (2). The privilege

(d) Hincks v. Nelthorpe, 1 Vern. 204. (b) Lord Montague v. Dudman, 2 Ves. 396, 398. (e) Richards v. Jackson, 18 Ves. (c) Baker v. Pritchard, 2 Atk. 388.

^{§ 554-558; 1} Smith. Ch. Pr. (2nd Am. ed.) 204; Newkirk v. Willett, 2 Caines Ca. Er. 296; Seymour v. Seymour, 4 John. Ch. 409; McIntyre v. Mancius, 3 John. Ch. 47.

(1) Story Eq. Pl. § 567. For form of a demurrer for immateriality, see ib. (3rd ed.) note (2); Willis, 475.

This objection of immateriality may be to the whole bill, or to a part of the

bill, or to a part only of the interrogations, or to a particular defendant only. Story Eq. Pl. § 568; Hare on Discov. 159, 160, 161.

(2) Wigram, Discov. (1st Am. ed.) 83, 84, pl. 136; Story Eq. Pl. § 599-602; 1 Greenl. Ev. § 237, et seq. and cases in notes; Gresley, Eq. Evid. 278-284; Brown v. Payson, 6 N. Hamp., 443; Foster v. Hall, 12 Pick. 89; Wright v. Mayo, 6 Sumner's Vesey, 280a, and notes.

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conferred by this species of confidence, applies, though in a diferent degree, to both the adviser and to the client (1).

The application of the rule with regard to professional confidence, to discovery required from the client, has been exemplified in the case already referred to of Richards v. Jackson, in which Lord Eldon, as we have seen, held, that if the demurrer had been confined to the discovery of the opinion, it would have been good; and it has since been extended to exempt a defendant from the discovery of the case itself, and to all confidential communications which have passed in the progress of the cause itself, and with reference to it before it was instituted (f) (2); and also to letters written by a defendant to his solicitor, after a dispute between him and the plaintiff had arisen with the view to taking the opinion of counsel upon the matter in question and which afterwards became the subject of the suit (g).

Origin of the principle.

The origin of this principle was clearly explained by Lord Brougham in the case of Greenough v. Gaskell (h), where, amongst other things, he observes: "This rule has been adopted out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts. and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare to tell his counsellor half his case." The rule is, however, confined to those cases where the communication has a reference to the subject of the dispute, otherwise the party himself has no general privilege or protection; he is, in other respects, bound to disclose all he knows and thinks respecting his own case; and the authorities. therefore, are, that he must disclose also the cases he has laid

How far party can protect himself by privilege.

⁽f) Garland v. Scott, 3 Sim. 396; Bolton v. Corporation of Liverpool, vi ibid. 467; Hughes v. Biddulph, 4 M Russ. 190.

⁽g) Vent v. Pacy, 4 Russ. 103; vide etiam, Greenough v. Gaskell, 1 M. & K. 93.
(A) 1 Myl. & K. 98.

⁽¹⁾ The privilege of secrecy which is thus afforded to professional mea, in regard to communications passing between them and their ckents, is in truth not so much the privilege of the adviser, as of his client. And it is quite possible that the client may be compelled to disclose the facts when his professional adviser would be bound to withhold them. Story Eq. Fl. § 599, note; Preston v. Carr, 1 Younge & Jer. 175, 179; Hare, Discov. 174, 175; Greenlaw v. King, 1 Beavan, 137.

(2) Story Eq. Pl. § 600; 1 Greenl. Ev. § 240.

before counsel for their opinion, unconnected with the suit itself (i).

the Discovery

In the case of Lord Walsingham v. Goodricke (k), Sir J. Wigram, V. C., stated the history of the Law upon this subject, in the following terms :-- "The first point decided upon this subject was, that communications between solicitor and client pending litigation, and with reference to such litigation, were privileged, upon this there is not at this day any question. The next contest was upon communications made before litigation, but in contemplation of, and with reference to, litigation which was expected and afterwards arose; and it was held, that the privilege extended to these cases also. A third question then arose with regard to communications after the dispute between the parties, followed by litigation, but not in contemplation of or with reference to that litigation; and these communications were also protected (m) (1). A fourth point which appears to have called for Professional decision, was the title of a defendant to protect from discovery confidence. in the suit of one party, cases or statements of fact made on his behalf by or for his solicitor or legal adviser, on the subject-matter in question, after litigation commenced or in contemplation of litigation, on the same subject, with other persons, with the view of asserting the same right. This was the case of Combe v. The Corporation of London (n). The question in that suit was the right of the corporation to certain metage dues, and the answer stated that other persons had disputed the right of the corporation to metage, and that they had in their possession cases which had been prepared with a view to the assertion of their rights against such other parties, in contemplation of litigation, or after it had actually commenced; Sir J. L. Knight Bruce held, that those cases, relating to the same question, but having reference to disputes with other persons, were within the privilege; and I perfectly concur with that decision."

The case before him was a bill for specific performance by a purchaser, and during the treaty for the sale and purchase of the estate; but before any dispute had arisen, the defendant, the vendor, from time to time, consulted his solicitor on the subject, and

⁽i) Ibid. 101. (k) 3 Hare, 122; and see Woods v. Woods, 4 H. 83.

⁽m) Bolton v. Corporation of Liverpool, 3 Sim. 467, S. C.; 1 Myl. &

K. 88; Hughes v. Biddulph, 4 Russ. 190; Vent v. Pacey, 4 Russ. 193; Clagett v. Phillips, 2 Y. & C. 82. (n) 1 Y. & C. 631.

Greenl. Ev. § 240; Story Eq. Pl. § 600; Beltzhoover v. Blackstook,
 Watts, 20; Foster v. Hall, 12 Pick. 89, 92, 98, 99.

To the Discovery.

Communications with solicitors before dispute.

written communications passed between them. A question arose upon a motion for the production of documents, whether these communications were privileged, regard being had to the circumstance that they took place before any dispute arose, though with reference to the very subject in respect of which that dispute had since arisen. And he decided chiefly upon the authority of Radcliffe v. Fursman (o), that such communications were privileged so far only as they might be proved to contain legal advice or opinions, but not otherwise.

Cases for opinion of counsel.

This case of Radcliffe v. Fursman is commonly referred to as a leading case upon the extent to which privilege applies for protecting cases laid before counsel for their opinion. The defendant in the cause demurred to so much of the bill as required him to discover an alleged case, the name of the counsel, and the opinion given upon it. The demurrer was overruled as to the first point, but allowed as to the second and third by Lord King, and the decision was affirmed in the House of Lords. This decision has been frequently mentioned with disapprobation, but having been made by the House of Lords, its authority is recognized. though only to the extent to which it strictly applies; Lord Brougham, in commenting upon it (p), observed, "Even by the report, and certainly by the printed cases which I have examined, together with my noble and learned predecessor, it appears plain. that the record did not show any suit to have been instituted, or even threatened at the time the case was stated for the opinion of counsel, and the decision being upon the demurrer, the Court had no right to know any thing which the record did not disclose. So far this decision rules, that a case laid before counsel is not protected; that it must be disclosed. But the decision does not rule that disclosure must be made of a case laid before counsel in reference to or in contemplation of, or pending the suit or action for the purposes of which the production is sought" (1).

It may be observed, that there does not seem to be any difference in principle between cases stated for opinion, and other communications of matters of fact between a client and his professional advisers (q).

(o) 2 Bro. P. C. 514.

Company, 3 M. & C. 355; Greenlaw v. King, 1 Beav. 137; Bunbury v. Bunbury, 2 Beav. 173. (q) 3 Hare, 129.

⁽p) Bolton v. Corporation of Liverpool, 1 Myl. & K. 95; see further upon this subject, Nias z. The Northern and Eastern Counties Railway

⁽¹⁾ Ante, 638, 639, cases in note.

The privilege is, however, confined to legal advisers, for it has To amended been held, that although a defendant in a suit cannot be compelled to discover or produce letters, &c., between himself and his so-Rule confined licitor, subsequently to the institution of the suit, and in relation to communications with lethereto, yet where there are more defendants than one, he is bound gal advisers. to discover letters which have passed between them with reference to their defences (r).

With regard to the privilege arising from professional confidence, With respect as it respects the legal advisers, that is of a more extended nature : to whom it is - "As it regards them, it does not appear that the protection is by any referqualified by any reference to proceedings pending or in contempla- ence to protion. If touching matter that comes within the ordinary scope of cause. professional employment, either from a client or on his account and for his benefit in the transactions of his business; or, which amounts to the same thing, if they commit to paper, in the course of their employment, on his behalf, matters which they know only through their professional relation to their client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any Court of Law or Equity, either as a party or as a witness. If this protection were confined to causes where proceedings had commenced, the rule would exclude the most confidential, and it may be, the most important of all communications. those made with a view of being prepared either for instituting of defending a suit up to the instant that the process of the Court issued" (s). "The protection would also be sufficient if it only included communications more or less connected with judicial proceedings, for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities, with no reference to any particular litigation, and without any other reference to litigation generally than all buman affairs have, in so far as every transaction may, by possibility, become the subject of judicial inquiry. It would be most mischievous, said the learned Judges in the Common Pleas (t), if it could be doubted whether or not an attorney consulted upon a man's title to an estate, was at liberty to divulge a flaw " (u) (1).

(t) Brard v. Ackerman, 2 Brod. &

⁽r) Whitbread v. Gurney, 1 Youn. 541.

⁽s) Lord Brougham, in Greenough v. Gaskell, 1 M. & K. 101.

Bing. 6. (u) Greenough v. Gaskell, 1 M. & K. 102.

⁽¹⁾ Story Eq. Pl. § 600, and note.

· To the Discovery. fessional advisers.

In the recent case of Herring v. Clobery (z), Lord Lyndhurst had occasion to review the authorities concerning the protection Rule as to pro- that exists with respect to communications between a client and his attorney; and with reference to the cause then before him, he laid down the rule, "That where an attorney is employed by a client professionally to transact professional business, all the communications that pass between the client and the attorney in the cause, and for the purpose of that business, are privileged communications: and that the privilege is the privilege of the client, and not of the attorney" (1).

Applies only to such communications as are professional.

It is to be observed, that although the general rule is, as laid down in the above case, that a counsel or solicitor cannot be compelled, at the instance of a third party, to disclose matters which have come to his knowledge, in the conduct of professional business for a client, even though such business had no reference to legal proceedings, either existing or in contemplation; there is no doubt that the privilege will be excluded, where the communication is not made or received professionally, and in the usual course of business (y), and during the existence of the professional relation. Thus a communication made to an attorney or solicitor, in the character of steward, either before the attorney or solicitor was employed as such (z), or after his employment had ceased, will not be a protection from disclosure (a) (2); and so where an attorney had been consulted by a friend, because he was an attorney, yet he refused to act as such (3); and was, therefore, applied to only as a friend (b), or where there could not be said, in any correctness of speech, to be a communication at all; as where, for instance, a fact became known to him, from his having been brought to a certain place by the circumstance of his being an attorney, but of which fact any other man, if there, would have been equally cognisant (c), or where the matter communicated was not in its nature

⁽z) 1 Ph. 91; see also Jones v. Pugh, ib. 96; and Adams v. Barry, 2 Y. & C. 167.

⁽v) Greenough v. Gaskell, 1 M. & K. 102; see also Desborough v. Rawlins, 3 M. & C. 515.

⁽z) Cutts v. Pickering, 1 Ventris,

⁽a) Wilson v. Rastall, 4 T. R 753. (b) Ibid.

⁽c) Doe v. Andrews. Cowp. 846; Sanford v. Remington, 2 Ves. J. 189; and Bunbury v. Bunbury, 2 Beav.

Ante, 637, note; Foster v. Hall, 12 Pick. 92, 93.
 Story Eq. Pl. § 602; 1 Greenl. Ev. 244.
 If a party has been requested to act as solicitor, and the communication is made under the impression that the request has been acceded to, it is privileged. Smith v. Yell, 2 Curt. 667.

private, and could in no sense be termed the subject of a confiden-tial disclosure (d); or where the thing to be disclosed has no reference to the professional employment, though disclosed while the Does not apply relation of attorney and client subsisted (e); in all such cases the where the communicamatters to be disclosed cannot be said to be matters which the pro- tion has no fessional adviser has learnt by communication with his client, or reference to on his client's behalf, or as matters which were committed to him employment; in his capacity of attorney, or which in that capacity alone he came to know (f) (1); and so where an attorney is, as it were, a or where the party to the original transaction, as if he be the attesting witness legal adviser is to a deed, he may be called upon to disclose facts relating to its transaction; execution, or as to an erasure made by himself in a deed or will (g); or when he has and so if he was present when his client was sworn to an answer knowledge in Chancery, he may be called upon to disclose the fact (h); and from his proif he has been employed as the steward or agent of a party, and fessional character. does not gain his knowledge of the facts as to which the discovery is required merely in his relation of attorney to his client, the rule will not apply, for in such cases there was no professional confidence, and he stands in the same situation as any other person (i) (2).

The privilege will also be excluded, with regard to communica- Privilege will tions to members of other professions than the Law; it has, there-other professions here held not to outer described to other professions. fore, been held not to extend to physicians or medical advisers (k) sions.

- (d) Rex v. Watkinson, 2 Stra. 1122.
- (s) Greenough v. Gaskell, ubi su-
- (f) Ibid. (g) 1 Phillips on Evidence, 43.
- (i) Morgan v. Shaw, 4 Mad. 56, n. t.; Desborough v. Rawlins, 3 M. & C. 515.
- (k) Duchess of Kingston's case, State Trials; Greenough v. Gaskell, ubi supra.

1 Greenl. Ev. § 245.

Greenl. Ev. § 244.
 The person called as a witness, or made defendant to a bill, must have learned the matter in question only as counsel, or attorney, or solicitor, and not in any other way. If, therefore, he were a party to the transaction, and especially if he were a party to a fraud (and the case may be put of his becoming an informer, after being engaged in a conspiracy), that is, if he were acting for himself, although he might be employed for another, he would not be protected from the discovery; for in such case his knowledge would not be acquired solely by his being employed professionally. Story Eq. Pl.

^{§ 601; 1} Greenl. Ev. § 242.

The attorney may be compelled to disclose the name of the person by whom he was retained; Brown v. Payson, 6 N. Hamp. 443; Chirac v. Reinicker, 11 Wheat. 280; Gowen v. Emery, 6 Shepley, 79; the character in which his client employed him; Beckwith v. Benner, 6 Carr. & P. 681. But see Chirac v. Reinicker, 11 Wheat. 280; the time when an instrument was put into his hands, but not its condition and appearance at that time; Wheatley v. Williams, 1 Mees & W. 533; Brown v. Payson, 6 N. Hamp. 443; and various other matters, for an enumeration of which, see

(1), nor will it extend to mere agents or stewards (1); it, however,

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nor to conveylicitors nor counsel.

applies to scriveners (m); and also to counsel (n); but it does not seem that it will extend to communications made to persons acting as conveyancers (2), who are neither counsel nor solicitors: thus in the South Sea Company v. Dolliffe, referred to in Vaillant v. Dodemead (o), a Mr. Gamlin is reported to have deare neither so- murred to the discovery sought from him, as to the alterations in certain articles, on the ground that he was counsel for the company; and it is stated that the demurrer was overruled, " for that what he knew was as the conveyancer only" (p). It has also been held that the privilege will not apply to one who has been consulted confidentially as an attorney, when in fact he was not **one** (q) (3).

Privilege extends to interpreters or agents between solicitor and client; and to representatives of solicitors;

A person who acts as interpreter (r) (4) or agent (s) (5) between an attorney and his client, stands in the same situation as the client himself, and the rule has also been held to apply to the clerk of the counsel or solicitor consulted (t) (6), and it is said, by the author of a book of great authority upon the subject of discovery, that the privilege extends to the representatives of the

(l) Vaillant v. Dodemead, 2 Atk. 524; Wilson v. Rastall, 4 T. R 573. (m) Harvey v. Clayton, 2 Swanst.

(n) Rothwell v. King, 2 Swanst. 221, n. a.; Spencer v. Luttrell, ibid. Stanhope v. Nott, ibid.

(o) Übi supra.

(p) Ibid.

(q) Fountain v. Young, 6 Esp. N. P. C. 113.

(r) Du Barre v. Livette, Peake's N. P. C. 78; cited 4 T. R. 756. (s) Parkins v. Hawkshaw, 2 Star-

kie, N. P. C. 239. (t) Taylor v. Foster, 2 C. & P. 295; Foot v. Haynes, 1 C. & P. 545; 1 Ry. & M. 165.

⁽¹⁾ Greenl. Ev. § 248, and note; Hewitt v. Prime, 21 Wendell, 79. Nor to clergymen. 1 Greenl. Ev. § 247; Commonwealth v. Drake, 15 Mass.

⁽²⁾ An attorney, who in his professional character has received from the owner of property confidential communications on the subject of a transfer of it, which is subsequently made, cannot be examined, against the consent of the grantee, in relation to such communication. Foster v. Hall, 12 Pick. 89.

⁽³⁾ The privilege of clients to have their communications to counsel kept secret, extends in New Hampshire not only to communications made to professional men, but to those made to any other person employed to manage a cause as counsel. Bean v. Quimby, 5 N. Hamp. 94.

(4) See Jackson v. French, 3 Wendell, 337; Andrews v. Solomon, 1 Pe-

ters, C. C. 326; Parker v. Carter, 4 Munf. 273.
(5) Bunbury v. Bunbury, 2 Beavan, 173.
(6) See 1 Greenl. Ev. § 239; Foster v. Hall, 12 Pick, 93; Jackson v. French, 3 Wendell, 337.

party (u), and it certainly seems just and reasonable that it should do so; for if the privilege is, as there is no doubt it is, the privilege of the client, it would be very unfair upon the client if he should be deprived of it by a circumstance over which he can have no control, viz:—the death of his professional adviser, and the transmission of his papers into the hands of his personal representative (1). Questions concerning privileged communications arise more frequently upon motions for the production of documents, than upon demurrers to discovery, and the subject is therefore more fully considered in the Chapter under that title, to which the reader is referred for more information upon the subject.

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V. The necessity that the bill should show, that a certain de-Because the gree of privity exists between the plaintiff and defendant, in order discovery reto entitle him to maintain his suit, has been before pointed out the defend-(x), and it has been stated that the want of such privity will afford ant's case. a ground for demurrer to the relief prayed. It may sometimes, however, happen that a plaintiff may, by his bill, show that supposing the facts he states are true, (and which, as we have seen, are admitted by every demurrer,) he has a right to the relief he prays, and yet may not show such a privity as will entitle him to to the discovery which he asks for; for it is a rule of the Court that, where the title of the defendant is not in privity, but inconsistent with the title made by the plaintiff, the defendant is not bound to discover the evidence of the title under which he claims (y) (2). Thus where a bill was filed by a person claiming to be lord of the manor, against another person also claiming to be lord of the same manner, and praying, amongst other things, a discovery

(u) Wigram on Discovery, 63.— In support of this proposition, the learned author of the above-mentioned work refers to Parkhurst v. Lowten, 1 Mer. 391. That case, however, does not warrant the position to the extent to which, from its position in that work, it might be inferred the learned author intended to carry it; all that is established by Parkhurst v. Lowten, with respect to the protection afforded to representatives, is that where the discovery sought would have exposed the testator to a

forfeiture, and he would therefore have been entitled to protect himself from it; the executor would be entitled to the same protection, provided he has an interest in endeavoring to protect himself, and the interest is of such a nature as to afford him ground for protection.

(x) Ante, p. 373. (y) Ld. Red. 191; Stroud v. Dea-con, 1 Ves. 37; Buden v. Dore, 2 Ves. 445; Sampson v. Swettenham, 5 Mad. 16; Tyler v. Drayton, 2 S. & S. 309, and the cases there cited.

^{(1) 1} Greenl. Ev. § 239.

⁽²⁾ Story Eq. Pl. § 571.

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in what manner the defendant derived title to the manor, and the defendant demurred, because the plaintiff had shown no right to the discovery; the demurrer was allowed (z); and so where a bill was filed by an heir, ex parte materna, against a general devisee and executor, who had completed, by conveyance to himself, a purchase of a real estate, contracted for by the testator after the date of his will, alleging that there was no heir ez parte paterna, but that the devisee set up a title under a release from his father, as heir ex parte paterna of the testator, and seeking a discovery in what manner the father claimed to be heir ex parte paterna, and the particulars of the pedigree under which he claimed, a demurrer to that discovery was allowed (a).

Rule, that plaintiff's right of discovery is own case.

The principle upon which these cases proceed has been very limited to facts clearly laid down, by a learned modern writer, to be, that the right material to his of a plaintiff in equity to the benefit of a defendant's oath, is limited to a discovery of such material facts as relates to the plaintiff's case, and does not extend to a discovery of the manner in which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence (b).

> This principle is also very distinctly recognized by Lord Brougham, in Bolton v. The Corporation of Liverpool (c); and by Lord Abinger, in Bellwood v. Wetherell (d). It is true that in those cases the question did not come before the Court upon demurrer, but the rule is the same in whatever way the question may be raised; by demurrer, by exceptions to the defendant's answer, or by motion to produce documents in the defendants possession; and that rule is (e), that although a plaintiff has a right to

(z) Ld. Red. 189; notes and cases there cited; vide etiam, Mayor of Dartmouth v. Seale, 1 Cox, 416. (a) Ivy v. Keckewick, 2 Ves. J. 679.

- (b) Wigram on Discovery, 90. (c) 1 M. & K. 88, 91. (d) 1 Y. & C. 211, Exch. Rep.
- (e) For instances in which this
- rule has been acted upon, where the objection has been taken by DEMURmen, vide Stroud v. Descon, 1 Ves. 37 ; Ivy v. Kekewick, 2 Ves. J. 679 ; Glegg v. Legh, 4 Mad. 191; Compton v. Earl Grey, 1 Y. & J. 154; Wilson v. Forster, 1 Younge, 280; Tooth v. Dean and Chapter of Canterbury, 3 Sim. 49.—On Motion to PRODUCE, Princess of Wales v. Earl

of Liverpool, 1 Swanst. 114; Micklethwaite v. Moore, 3 Mer. 292; Bligh v. Benson, 7 Price, 205; Tyler v. Drayton, 2 S. & S. 309; Sampson v. Swettenham, 5 Mad. 16; 2 M. & Swettenham, 5 Mad. 16; 2 M. & K. 754, n. b.; Firkins v. Low, 13 Price, 193; Wilson v. Forster, M'Lel. & Young, 274; Tomlinson v. Ly-mer, 2 Sim. 489; vide etiam, Hobson v. Warrington, 3 P. Wms. 35; Da-vers v. Davers, 2 P. Wms. 410; Bur-ten v. Naville, 2 Cap. 242; Shades, a. ton s. Neville, 2 Cox, 242; Shaftsbury s Arrowsmith, 4 Ves. 66; Astes s. Lord Exeter, 6 Ves. 288; Worsley v. Watson, cited ib. 289; Bolton v. The Corporation of Liverpool, I M. & K. 88. On Exceptions to Asswars, Buden v. Dore, 2 Ves. 445.

a discovery or production of documents which tend to make out his own title affirmatively, he has no right to a discovery or production which are not immediately connected with his own title, and which form part of his adversary's (1).

the Discovery.

It is to be observed that this rule will not extend to defeat the Will not apply plaintiff of his right to a discovery from the defendant, where he makes a case makes a case in his bill, which, if admitted, would disprove the which would truth of, or otherwise invalidate the defence made to the bill; in defendant's such cases he is entitled to a discovery, from the defendant, of all case, which may enable him to impeach the defendant's case, as in cases of bills to impeach a will on the ground of fraud.—In such cases the plaintiff does not rest on a mere negative of the defendant's case, but insists upon some positive ground entitling him to the assistance of the Court, such as fraud, or other circumstances of equitable cognizance, to a discovery, of which no objection of this kind can be raised (f).

It may be proper also to add, that if the plaintiff is entitled to or where disa discovery of deeds or other documents for the purpose of estab- is common to lishing his own case, his right to such discovery will not be affect-both. ed by the circumstance that the same documents are evidence of the defendant's case also (g) (2); and that if a defendant, bound to keep distinct accounts for another party, improperly mixes them with his own, so that they cannot be separated, he must discover the whole (h) (3).

VI. The circumstance that a party not before the Court has an Because a interest in a document which a defendant, so far as his own inter-third party has est is concerned, is bound to produce, will, in some cases, deprive document the plaintiff of his right to call for its production, at least in the sought to be absence of the third party, as in the instance of a person being produced; a trustee only for others (4). Upon this principle, a mortgagee cannot be compelled to show the title of his mortgagor, unless such mortgagor is before the Court (i): in such cases, however,

an interest in a

(f) Hare on Discovery, 201. (g) Burrell v. Nicholson, 1 M. & K. 680; Wigram on Discovery, 50; and see the case of Smith v. The Duke of Beautort, 1 Hare, 507; Combe v. The Corporation of Lon-don, 1 Y. & C. 631.

(h) Freeman v. Fairlie, 3 Mer. 35; Earl of Salisbury v. Cecil, 1 Cox, 277; Wigram, 59; Hare on Discov-(i) Lambert v. Rogers, 2 Mer. 489; see however the case of Balls v. Margrave, 3 Beav. 448, and 4 Beav. 119.

⁽¹⁾ Story Eq. Pl. § 572-574c; Shaftsbury v. Arrowsmith, 4 Summer's Vesey, 72, Mr. Hovenden's note (1); Wigram, Discov. (Am. ed.) p. 14, § 23, p. 15, § 27, 259, et seq. § 342, et seq.; Mitford, Eq. Pl. by Jeremy, 189-

⁽²⁾ Wigram Discov. (Am. ed.) p. 242, § 325. (3) Wigram Discov. (Am. ed.) p. 243, § 326. (4) Wigram Discov. (Am. ed.) p. 243, § 327.

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a demurrer, for want of proper parties, would be the proper form in which to raise the objection, where the bill is for relief as well as for a discovery.

The above are the principal grounds upon which a defendant may demur to the discovery sought by a bill, although the plaintiff may be entitled to the relief he prays, in case he can establish a right to it by other means than a discovery from the defendant, on those points as to which the defendant is entitled to defend himself from making a discovery; in all other cases, a plaintiff, if entitled to relief, is entitled to call upon the defendant to make a full discovery of all matters upon which his title of relief is found-It does not, however, very often happen that these grounds affect the whole of the discovery sought; thus, as we have seen, a man is bound to answer to the fact of trading, although he is not bound to answer whether he has committed an act of bankruptcy (k); in such cases the defendant must answer all those parts of the bill, the answer to which will not expose him, or have a tendency to expose him, to the inconveniences before enumerated; a demurrer, under such circumstances, should precisely distinguish each part of the bill demurred to, and if it does not do so it will be overruled (1).

where a particular discovery may be objected to, it may be done by answer.

It may be noticed here that if a defendant objects to a particular discovery, and the grounds upon which he may demur appear clearly on the face of the bill, and the defendant does not demur to the discovery, but answering to the rest of the bill declines answering to so much, the Court will not compel him to make the discovery (m); but in general, unless it clearly appears by the bill that the plaintiff is not entitled to the discovery he requires, or that he ought not to be compelled to make it, a demurrer to the discovery will not hold, and the defendant must protect himself either by plea or answer (n) (1).

Lastly, it may be mentioned, that communications which come within a certain class of official correspondence, are privileged upon the ground, that they could not be made the subject of discovery in a Court of Justice, without injury, to the public interest (2).

(k) Chambers v. Thompson, 4 Bro. C. C. 434.

Blackburn, 2 V. & B. 121, 124.

(m) Lord Red. 200; Wrottesley v. Bendish, 3 P. Wms. 235; Parkhurst v. Lowten, 1 Mer. 401.

(n) Ld. Red. 200.

⁽¹⁾ Chetwynd v. Lindon, 2 Ves. 450; Devonsher v. Newenham, 2 Sch. & Lef. 199; Robinson v. Thompson, 2 V. & B. 118; Wetherhead v.

Story Eq. Pl. § 605.
 See 1 Greenl. Ev. § 250-251.

In the recent case of Smith v. The East India Company (o), To the Discovery. Lord Lyndhurst had to consider whether correspondence between the Court of Directors of the East India Company and the Board of Control came within the limits of this privilege; and he decided that it could not be subject to be communicated, without infringing the policy of the Act of Parliament (p), and without injury to the public interests.

In addition to the above-mentioned causes of demurrer it may be For irregularstated, that any irregularity in the frame of a bill, of any sort, may frame of the be taken advantage of by demurrer. Thus, if a bill is brought, con-bill. trary to the usual course of the Court, a demurrer will hold (q) (1); as where, after a decree directing incumbrances to be paid according to priority, a creditor obtained an assignment of an old mortgage, and filed a bill to have the advantage it would give him, by way of priority, over the demands of some of the defendants, a demurrer was allowed (r), it being in effect a bill to vary a decree, and yet was neither a bill of review, nor a bill in the nature of a bill of review, which are the only kinds of bills which can be brought to affect or alter a decree, unless the decree has been obtained by fraud; where, however, a supplemental bill was filed in a case in which, according to the former practice of the Court, a supplemental bill was the proper course; but by more recent practice the same object had been accomplished by petition, Sir J. Leach, V. C., held, that the supplemental bill was not rendered irregular by the present practice, although the circumstances would be taken into consideration upon the question of costs (s).

If an irregularity arises in any alteration of a bill, by way of To amended amendment, it may also be taken advantage of by demurrer (t), as if a plaintiff amends his bill and states a matter, arisen subsequently to the filing of the bill (2), which consequently ought to be the subject of a supplemental bill, the defendant may demur (u). If. however, a matter which has arisen subsequently to the filing of the original bill, and is properly the subject of a supplemental bill, is stated by amendment, and the defendant answers the amended bill,

(s) Davies v. Williams, 1 Sim, 5.

⁽e) 1 Ph. 50. (p) 3 & 4 Will. IV. c. 85. (q) Lord Red. 206.

⁽t) Lord Red. 206; vide etiam, Lady Granville v. Ramsden, Bunb.

Wortley v. Birkhead, 3 Atk. (u) Brown v. Higden, 1 Atk. 291.

l) Story Eq. Pl. § 643. (2) See ante, 463-465.

To Amended Bills

it is too late to object to the irregularity at the hearing (x); unless the defendant has claimed the same benefit by his answer which be would have been entitled to had he demurred to the amended bill, in which case, as we have seen, he will be entitled to the benefit of the objection at the hearing (y).

May be on the same grounds as demurrers to original bill.

With respect to demurrers to amended bills in general, it may be observed, that an amended bill is liable to have the same objections taken to it, by demurrer, as an original bill; and that, even where a demurrer to the original bill has been overruled, a demutrer to an amended bill has been allowed (z) (1); and the circumstance of the amendment being of the most trifling extent, will not, it seems, make any difference; and, even where the bill was amended by the addition of a party only, the demurrer was held to be regular (a). The rule is also the same where the defence first put in is a plea, and the bill is afterwards amended, the amendedbill may still be demurred to (b). A defendant, however, cannot, after he has answered the original bill, if the plaintiff amends it, put in a general demurrer to the whole bill; because the answer to the original bill, being still on the record, will, in fact, overrule the demurrer (c). The defendant must, in such case, confine his demurrer to the matter introduced by amendment.

After answer to original bill. defendant cannot demur to the whole amended bill.

Of partial demurrers. It has been before stated, with regard to demurrers to the discovery, where the ground of demurrer does not affect the whole of the discovery sought, that the part which will not expose the defendant to the inconveniences which render it improper that he should be called upon to make the discovery, must be answered. The same rule extends to demurrers in general; for, in complicated cases, such as usually come under the cognizance of Courts of Equity, it frequently happens that a plaintiff may show a right to part only of the relief or discovery which he asks for, in which case the rules of the Court permit the defendant to confine his answer to that part, as to which, if true, the plaintiff would have a right to the interference of the Court, and to defend himself as to the rest by a partial demurrer.

It is not, however, necessary that he should adopt the form of

⁽z) Archbishop of York v. Stapleton, 2 Atk. 136.

⁽y) Ante, 460; vide etiam, Milligan v. Mitchell, 1 M. & C. 433.
(z) Bancroft v. Wardour, 2 Bro.

C. C. 66; 2 Dick. 672, S. C.

⁽a) Bosanquet v. Marsham, 4 Sim. 573.

⁽b) Robertson v. Ld. Londonderry, 4 Sim. 226.

⁽c) Atkinson v. Hanway, 1 Caz, 360; see Ellice v. Goodson, 3 M. & C. 653; and ante, page 468.

^{(1) 1} Hoff. Ch. Pr. 216, 217; 1 Smith Ch. Pr. (2nd Am. ed.) 214.

Partial Demurrer.

a partial demurrer, for the purpose of protecting himself from giving discovery, to which the plaintiff is not entitled, as by the 38th Order of August, 1841, it is directed, "that a defendant shall be at liberty, by his answer, to decline answering any interrogatory, or part of an interrogatory, from answering which he might have protected himself by demurrer; and that he shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill, from which he might have protected himself by demurrer." The effect of this Order will have to be considered again in the Chapter on Answers; it may be sufficient here to observe, that in cases in which it is still thought expedient to adopt the defence of a partial demurrer against discovery, this Order does not seem to affect the practice; but in such a case the 37th Order of August, 1841, is important, which directs, "that no demurrer or plea shall be held bad, and overruled upon argument, only because the answer of the defendant may extend to some part of the same matter as may be overruled by such demurrer or plea." And we have before seen, that now no demurrer or plea shall be held bad, and overruled upon argument, only because such demurrer or plea shall not cover so much of the bill as it might by law have extended to (d).

There does not however seem to be any thing in these Orders Demurrers to enable a demurrer to be good in part and bad in part (e); so cannot be good in part and bad that if a demurrer is general to the whole bill, and there is any in partpart, either as to the relief or to the discovery, to which the defendant ought to put in an answer, the demurrer being entire must be overruled (f) (1).

(f) Per Lord Hardwicke, in Met-calf v. Hervey, 1 Ves. 248; Earl of

⁽d) See page 604. (e) In this respect there is a difference between a plea and a demur-rer; Mayor, &c. of London v. Levy, v. Gee, 17 Ves. 273; Attorney-gen-8 Ves. 403 [Sumner's ed. Hovenden's eral v. Browne, 1 Swanst. 304. note (3)]; Baker v. Mellish, 11 Ves.

⁽¹⁾ A demurrer bad in part is void in toto. Verplanck v. Caines, 1 John. Ch. 57; Kuypers v. Reformed Dutch Church, 6 Paige, 571; Shed v. Garfield, 5 Vermont, 39; Lube, Eq. Pl. (Am. ed.) 255; Castleman v. Veitch, 3 Rand. 598; Kimberley v. Sells, 3 John. Ch. 467; Graves v. Downey, 3 Monroe, 356; Chase's case, 1 Bland, 217; Blount v. Garen, 3 Hayw. 88; 1 Smith, Ch. Pr. (2nd Am. ed.) 206. But see Pope v. Stansbury, 2 Bibb,

It is a general rule that a demurrer cannot be good as to a part, which it covers, and bad as to the rest; and therefore it must stand or fall altogether. Story Eq. Pl. § 443; Higginbotham v. Burnet, 5 John. Ch. 184.

A demurrer to the whole of a bill, containing some matters relievable and others not, is bad, unless the bill is multifarious. Dimmock v. Bixby, 20 Pick. 368. See ante, 608, notes.

To Part of the Bill. Of amending demurrers.

In what case leave will be given to put in less extended demurrer.

To distinct parts of the bill.

Demurrer may be good as to one defendant and bad as to another.

Instances are, certainly, mentioned, by Lord Redesdale (g), in which demorrers have been allowed in part: but whatever my have been done formerly, the practice appears to be now more strict, though sometimes the Court has, upon overruling a demurrer, given the defendant leave to put in a less extended demurrer; or to amend and narrow the demurrer already filed (A). In the latter case, however, the application to amend must be made before the judgment upon the demurrer, as it stands, has been pronounced (i); but even where that has been omitted, the Court has, after the demurrer has been allowed, upon a proper case being shown, given the defendant leave, upon motion, to put in a less extended demurrer and answer (k).

A defendant may also put in separate demurrers to separate and distinct parts of a bill, for separate and distinct causes (I); for the same grounds of demurrer, frequently, will not apply to different parts of a bill, though the whole may be liable to demurrer; and in this case one demurrer may be overruled, upon argument, and another allowed (m).

It is to be noticed, that although a demurrer cannot be good in part and bad in part, it may be good as to one of the defendants demurring, and bad as to others (n) (1).

### SECTION III.

# Of the Form of Demurrers (2).

A DEMURRER is usually entitled "The Demurrer of A. B. (or of A. B. and C. D.), to the bill of complaint of E. F." If it be accompanied by a plea, or by an answer, it should be called in the

- (g) Ld. Red. 214; Rolt v. Lord Somerville, 2 Eq. Ca. Ab. 759; Radcliffe v. Fursman, 2 Bro. P. C. 514.

  (h) Baker v. Mellish, 11 Ves. 68;
- Thorpe v. Macauley, 5 Mad. 318.

  (i) Baker v. Mellish, 11 Ves. 72.

  (k) Ibid.; [Story Eq. Pl. § 459.]
- (l) Lord Red. 214; North v. Earl of Strafford, 3 P. Wms. 148; Roberdeau v. Rous, 1 Atk. 544.
- (m) North v. Earl of Strafford, abi supra; [Little v. Archer, 1 Hogan, **55.**]
- (n) Mayor, &cc. of London v. Levy, 8 Ves. 403.

Where a demurrer to a bill is overruled, because it covers too much, the defendant may, on exception to his answer, raise the question of the matriality of the discovery. Kuypers v. Ref. Dutch Church, 6 Paige, 570.

(1) Story Eq. Pl. § 445; 1 Smith, Ch. Pr. (2nd Am. ed.) 206.

⁽²⁾ See the common form of a general demurrer in Story Eq. Pl. § 55, note; Van Heyth. Eq. Drafts. 419; 2 Ham. Ch. Pr. by Newl. p. 607; Barton's suit in Eq. 107, 108; 1 Smith, Ch. Pr. (2nd Am. ed.) 209.

title "the demurrer and plea or demurrer and answer." Where it is to an amended bill, it need not be expressed, in the title, to be a demurrer to the original and amended bill; but a demurrer to Title of a dethe amended bill will be sufficient (o).

**Partial** Demurrers. murrer.

As a demurrer confesses the matters of fact to be true, as stated Commences by the opposite party, it is always preceded by a general protesta- with a protestion against the truth of the matters contained in the bill (1), a tation. practice borrowed from the Common Law, and probably intended to avoid conclusion in another suit (p), or in the suit in which it is put in, in case the demurrer should be overruled.

After the protestation, the demurrer, where it is not to the When to part whole bill, proceeds to point out the parts of the bill to which it of the bill is intended to apply. The rule, as to this, is very clearly laid down by Lord Redesdale, in Devonsher v. Newnham (q). has been repeatedly said, that where a defendant demurs to part, and answers to part of a bill, the Court is not to be put to the trouble of looking into the bill or answer, to see what is covered by the demurrer; but that it ought to be expressed in clear and precise terms, what it is the party refuses to answer, so that the Master, upon a reference to him upon exceptions, should be able to ascertain, precisely, how far the demurrer goes, and what is to be answered. And I cannot agree, that it is a proper way of de-Answer to a murring to say that the defendant answers to such a particular fact, particular part and demurs to all the rest of a bill; for this would put the Master to demurrer as to great difficulty in saying what was demurred to, and whether the the rest, bad. answer was sufficient or otherwise. The defendant ought to demur to a particular part of the bill, specifying it precisely (r) (2)."

It is to be noticed, that although a demurrer, in the form above Demurrer to stated, viz., "to all the rest of the bill which is not answered," all the bill exwould, for the reasons stated by Lord Redesdale, be a bad form of cept a particular part specdemurrer; a demurrer to all the bill, except as to a particular ified, good. specified part, would not be open to the same objection; and where the exception applies to a very small part only of the bill, it has been held to be the best way of demurring (s). In framing such a demurrer, however, care must be taken that it should ap-

⁽o) Smith v. Bryon, 3 Mad. 428. p) Lord Red. 212.

^{450;} Salkeld v. Science, ib. 107. (s) Hicks v. Raincock, 1 Cox, 40; vide etiam, Howe v. Duppa, 1 V. &

⁽q) 2 Sch. & Lef. 199, 205. (r) Chetwynd v. Lindon, 2 Ves. B. 511.

Story Eq. Pl. § 452, 457; 1 Smith, Ch. Pr. (2nd Am. ed.) 209.
 Johnston v. Johnston, 2 Moll. 414; Story Eq. Pl. § 457, 458, and notes.

Bill. distinctly.

To Part of the pear distinctly by the demurrer itself, what part of the bill is to be included in the exception; for if it should be necessary to relate Part demurred to the answer, for the purpose of ascertaining it, the demurrer will to must appear be bad (1). Thus in Robinson v. Thompson (t), where the defendant demurred as to all the relief, and all the discovery sought by the bill, so far as the bill sought a discovery "touching" the several title-deeds or instruments, whereby the entails in the bill mentioned were respectively alleged "to have been created," and also excepting certain other matters specifically stated; and as to the rest of the bill, not demurred to, &c., the defendant proceeded to answer, Sir Thomas Plumer, V. C., held the demurrer to be bad, because it would be necessary, in order to determine the extent of the demurrer, and to ascertain what was comprised in the vague expression, "the residue of the bill," to go through the whole record, involving a long title, as to all touching which the defendant professes to answer, and laying the Master under the same difficulty upon exceptions.

The best rule for guiding the pleader in framing a partial demurrer, so as to point out, with sufficient distinctness, the parts intended to be demurred to, is, perhaps, to consider in what manner he would, supposing the demurrer to be allowed, proceed, on behalf of the plaintiff, to frame exceptions to the answer for insufficiency. If he should find that his demurrer is so framed that the question, whether any part of the bill which may afford a ground for exceptions, be covered by a demurrer or not, would be open to doubt or argument, either in the mind of the Master or of the Court, his demurrer will be informal. If, on the other hand, he should find that he can clearly point out, by his exceptions, any part of the bill which he considers as unanswered, without any doubt being likely to arise as to whether that part is covered by the demurrer or not, the demurrer will be good in point of form, whether it points out the part demurred to, by exception or by specific statement.

Where two or more demurrers they must pount out the ou counted by each.

The same rule will apply to cases where there are two or more distinct demurrers to different portions of the bill; in such cases the different portions of the bill to be covered by each demurrer, must be distinctly pointed out. And where a demurrer is put in to such parts of an amended bill, as have been introduced by the amendments, it will not be sufficient to say it is a demurrer to the

(t) 9 V. & B. 118.

⁽¹⁾ Story Eq. Pl. § 457, 458.

amendments, but the parts must be specifically pointed out, and a demurrer to so much of the amended bill, as has not been answered by the answer to the original bill, will be bad (u).

Special

A demurrer will not be good if it merely says, generally, that Must express the defendant demurs to the bill (z); it must express some cause the causes of demurrer. of demurrer, either general or specific (1): a defendant is said to demur generally, when he demurs to the jurisdiction, or to the substance of the bill; or specially, when he demurs on the ground of a defect in form. He may, however, in cases where he demurs either to the jurisdiction or to the substance, state specially the particular grounds upon which he founds his objection; and indeed some of the grounds of demurrer, which go to the substance of the bill, require rather a particular statement; thus a demurrer, for want of parties, must, as has been before stated, show who are the necessary parties, in such a manner as to point out to the plaintiff the objection to his bill, so as to enable him to amend by adding proper parties (y); and in the case of a demurrer for multifariousness, a mere allegation, "that the bill is multifarious," will be informal; it should state, as the ground of demurrer, that the bill unites distinct matters upon one record, and show the inconvenience of so doing (z).

It is also to be observed, that some objections, which appear to General deby merely upon matters of form, may be taken advantage of under murrers. general demurrers, for want of equity; thus it has been before stated, that some bills may be demurred to on the ground that they are not accompanied by an affidavit (2); that objection, how- To what objecever, is in fact an objection to the Equity, because the cases in tion they which an affidavit is required, are those in which the Court has no jurisdiction, unless upon the supposition that the fact stated in the affidavit is true; and the Court requires the annexation of the affidavit to the bill, for the purpose of verifying that fact; and so in those cases in which a demurrer will lie because the plaintiff's right is not stated to have been first established at Law, it is because the ground of the Court's interference is the fact that the legal title of the defendant has been established in some proceeding in a Court of ordinary jurisdiction. In all these cases, the ob-

⁽u) Mynd v. Francis, 1 Am. 6. (y) Ante, 333.(z) Rayner v. Julian, 2 Dick. 677; x) Duffield v. Graves, Cary, 87; Offley v. Morgan, ib. 107; Peachey 5 Madd. 144, n. b. S. C. v. Twycross, ib. 113.

Nash v. Smith, 6 Conn. 422. See Johnston v. Johnston, 2 Moll. 414.
 Ante, 625.

Special Demurrers. jection may be made either in the form of a special demurrer, or of general demurrer for want of Equity; because the plaintiff, by his bill, does not bring his case within the description of cases over which the Court exercises jurisdiction. Upon the same principle, a defendant may take advantage, by general demurrer, of the omission to offer to do equity in cases where such an offer ought to be made. The objection for want of sufficient positiveness in the defendant's statement of facts, within his own knowledge, may also be taken by general demurrer (a).

Demurrer to must be special.

It is to be observed, that where a defendant to a bill praying discovery only relief, demurs to the discovery only, he cannot do so under a general demurrer for want of equity; he must make it the subject of special demurrer (b),

Speaking demurrers.

Care must be taken, in framing a demurrer, that it is made to rely only upon the facts stated in the bill, otherwise it will be what is termed a speaking demurrer, and will be overruled (c) (1). Thus where a bill was filed to redeem a mortgage, alleging that the plaintiff's ancestor had died in 1770, and that, soon after, the defendant took possession, &cc.; and the defendant demurred, and for cause of demurrer showed, that it appeared, upon the face of the bill, that from the year 1770, which is upwards of twenty years before the filing of the bill, the defendant had been in possession, &c., Lord Thurlow overruled the demurrer, because the language of the bill did not show that the defendant took possession in the year 1770, but that he did so could only be collected from the averment in the demurrer (d) (2). It is material to notice that,

(c) Brownsword v. Edwards, 2 Ves. 245. (a) Ante, 426.
(b) Whittingham v. Burgoyne, 3 (d) Edsell v. Buchannan, 4 Bro. Anst. 900. C. C. 254; 2 Ves. J. 83, S. C. (1)

⁽¹⁾ A speaking demuseer is one which introduces a new fact or averment, which is necessary to support the demurrer; Davies v. Williams, 1 Simona, 7; and which does not appear distinctly on the face of the bill. Brooks v. Gibbons, 4 Paige, 374. See Kuypers v. Ref. Dutch Church, 6 Paige, 570; M'Comb v. Armstrong, 2 Moll. 295; Story Eq. Pl. § 448; Pendlebury v. Walker, 4 Younge & Coll. 424; 1 Smith, Ch. Pr. (2nd Am. ed.) 206.

(2) It is said in Brooks v. Gibbons, 4 Paige, 375, that "the case of Edvell v. Buchannan, 2 Ves. inp. 83 has been frequently mismaderated. The

zell v. Buchannan, 2 Ves. jun. 83, has been frequently misunderstood. The demurrer in that case was not overruled as a speaking demurrer, merely on account of a modest suggestion, that the time, stated by the complainant, about the year 1770,' was upwards of twenty years before the filing of the bill. But it was because that suggestion, from the manner in which it was introduced into the demurrer, was in the nature of an averment, that the defendant had been in possession of the mortgaged premises for more than twenty years. And the fact of such possession was necessary to sustain the defence set up on the argument of the demurrer; which defence was that the complainant's right to redeem was barred by the lapse of time. The

in order to constitute a speaking demurrer, the fact or averment introduced must be one which is necessary to support the demurrer, and is not found in the bill; the introduction of immaterial facts, or averments, or of arguments, is improper, but it is mere surplusage, and will not vitiate the demurrer (e).

Special Demurrers.

A defendant is not limited to show one cause of demurrer only, Several causes he may assign as many causes of demurrer as he pleases, either may be assignto the whole bill, or to each part of the bill demurred to; and if ed. any one of the causes of demurrer assigned hold good, the demurrer will be allowed (f). Where, however, two or more causes of demurrer are shown to the whole bill, the Court will treat it as one demurrer; and if one of the causes be considered sufficient, the order will be drawn up, as upon a complete allowance of the demurrer (g). A defendant may, also, at the hearing of his de-Ofdemurrers murrer, orally assign another cause of demurrer, different or in ore tenus. addition to those assigned upon the record, which, if valid, will support the demurrer, although the causes of demurrer, stated in the demurrer itself, are held to be invalid. This oral statement of a cause of demurrer, at the Bar, is called demurring ore tenus (1).

It is to be noticed that, although a defendant may, either upon Must be cothe record, or ore tenus, assign as many causes of demurrer as he extensive with pleases, such causes of demurrer must be co-extensive with the demurrer on demurrer upon the record; therefore, causes of demurrer, which apply to part of the bill only, cannot be joined with causes of de-

(e) Cawthorn v. Chalie, 2 S. & S. 323; Jones v. Frost, 3 Mad. 1 Jac. ; Davies v. Williams, 1 Sim. 5.

466, S. C.
(g) Wellesley v. Wellesley, 4 M. & C. 554. (f) Harrison v. Hogg, 2 Ves. J.

precise time, at which the defendant's possession commenced, not appearing from the bill itself, the averment that the heir of the mortgagee had been in possession 'upwards of twenty years before the bill filed,' should have

been brought forward by plea, or answer, and not by demurrer."

(1) Where a demurrer is put in to the whole bill for causes assigned on the record, if those causes are overruled, the defendant will be allowed to assign other causes of demurrer, ore tenus, at the argument. Brinckerhoff v. Brown, 6 John. Ch. 149; Story Eq. Pl. § 464; Wright v. Dame, 1 Metcalf, 237; M'Dermot v. Blois, R. M. Charlt. 281; Daly v. Kirwan, 1 Irish Eq.

7. See Garlick v. Strong, 3 Paige, 440.
But a demurrer ore tenus will never be allowed unless there is a demurrer on record; for if there is a plea on record, and that is disallowed, a demurrer ors tenus will also be disallowed. Story Eq. Pl. § 464. See Hook v. Dorman, 1 Sim. & Stu. 227; Metcalfe v. Brown, 5 Price, 560.

Under a general demurrer for want of Equity, a demurrer for want of parties may be made ore tenus. Robinson v. Smith, 3 Paige, 231; Garlick v. Strong, 3 Paige, 452; Stillwell v. M'Neely, 1 Green Ch. 305. See Pyle v. Price, 6 Sumner's Vesey, 781, Mr. Hovenden's note (2); Mitford Eq. Pl. by Jeremy, 217.

ore lenus.

Of Demurring murrer which go to the whole bill (A); for, as we have seen before, a demurrer cannot be good in part and bad in part, which would be the case if a demurrer, professing to go to the whole bill, could be supported by the allegation of a ground of demurrer which applies to part only.

Whether after a partial demurrer overruled, an ore will hold to the same part?

It appears to have been the opinion of Lord Chief Baron Alexander, that after a demurrer to part of a bill has been overruled, a demurrer ore tenus to the same part cannot be allowed (i); but, tenus demurrer in a recent case, where a bill was filed to restrain the defendant from setting up outstanding terms upon the trial of certain actions of ejectment, which the plaintiff intended to bring for the purpose of recovering possession of the property in dispute, and the defendant pleaded as to so much of the bill as sought any relief on account of the outstanding terms, that there was no such term; and, as to the rest of the bill, demurred, because the plaintiff had not, by his bill, shown that he was entitled to the estate; Lord Langdale, M. R., overruled the demurrer on record; because, although it professed to cover part of the bill only, it was in fact a demurrer to the whole bill, and was consequently overruled by the plea (k); but he allowed a demurrer by the defendant. ore tenus, for want of equity as to so much of the bill as was not covered by the plea (1). It is to be observed, that the allowance of this demurrer is no departure from the rule above laid down: for the demurrer on record, although in effect extending to the whole bill, was in words applied to that part only of the bill which was not covered by the plea, to the whole of which part the demurrer, ore tenus, was applicable; so that, in fact, the demurrer on record, and the ere tenus demurrer, were co-extensive; and certainly there does not appear to be any reason why the course pursued by the Master of the Rolls should not be adopted in similar cases, in preference to that which the Court of Exchequer adopted, since the only inconvenience in general likely to result from allowing a partial demurrer, ore tenus, must be the difficulty of pointing out the precise part of the bill to which the demurrer is applicable; an inconvenience which may result when the original demurrer is to the whole bill, and the demurrer at the bar is to part only; but which cannot possibly be felt when the original demurrer is to part only, and the demurrer, ore terms, is to the same part.

⁽A) Pitts v. Short, 17 Ves. 213, 216; Metcalf v. Brown, 5 Price, 560. (i) Shepherd v. Lloyd, 2 Y. & J. 490.

⁽k) But see new Orders 36 and M, Aug. 1841. (!) Crouch v. Hickin, 1 Keen, 385, and see p. 650.

The demurrer, having assigned the cause or causes of demurrer, then proceeds to demand judgment of the Court, whether the defendant ought to be compelled to put in any further or Demand of other answer to the bill, or to such part thereof, as is specified as judgment. being the subject of demurrer, and concludes with a prayer that the defendant may be dismissed with his reasonable costs in that behalf sustained.

Partial Demurrers.

When a demurrer is to part of the bill only, the answer to the In what cases remainder usually follows the statement of the causes of demur-coupled with rer, and the submission to the judgment of the Court of the plain- answer. tiff's right to call upon the defendant to make further or other answer.

It was formerly an invariable rule, that an answer to any part of a bill demurred to would overrule the demurrer (m), even though the part answered was immaterial (n) (1). And this rule was carried so far that where the demurrer did not in form extend to the part answered, yet if the principle upon which the demurrer depended was such that it ought to have extended to the whole bill, then the answer to such part overruled the demurrer (o) (2). This practice has, however, now been abolished by the Orders of August, 1841 (p). The rule was the same where a defendant pleaded to a part covered by the demurrer, and the 37th Order of August, 1841 (3), does not in terms provide for the case where a plea extends to some part covered by the demurrer; as however a

(m) Tidd *. Clare, 2 Dick. 81; Hester v. Weston, 1 Vern. 463; Rob-

erts v. Clayton, 3 Anst. 715.
(a) Ruspini v. Vickery, cited Ld.
Red. 211; Savage v. Smalebroke, 1

Vern. 90. (o) Dawson v. Sadler, 1 S. & S.; Sherwood v. Price, 9 Price, 259; Hester v. Weston, 1 Ves. 463.

(p) See page 650.

 See Story Eq. Pl. § 462, 463; Mitford Eq. Pl. by Jeremy, 209, 211.
 A demurrer may be to the whole bill or to a part only of the bill; and the defendant may therefore demur as to one part, plead as to another part, and answer as to the rest of the bill. Story Eq. Pl. § 442; Newton v. Thayer, 17 Pick. 132, 133. But a defendant cannot plead or answer, and demur both, to the whole bill or to the same part of a bill. Clark v. Phelps, 6 John. Ch. 214; Beauchamp v. Gibbs, 1 Bibb, 481; Robertson v. Bingley, 1 M'Cord Ch. 352. If the defendant demur to the whole bill, an answer to a part thereof is inconsistent; and the demurrer will be overruled. Story Eq.

For the same reason, if there be a demurrer to a part of a bill, there can-For the same reason, if there be a demurrer to a part of a bill, there cannot be a plea or answer to the same part, without overruling the demurrer. Story Eq. Pl. §442; Clark v. Phelps, 6 John. Ch. 214; Souzer v. De Meyer, 2 Paige, 574; Mitford Eq. Pl. by Jeremy, 209, 210; H. K. Chase's case, 1 Bland, 217; Leacraft v. Dempsey, 4 Paige, 124; Spofford v. Manning, 6 Paige, 383; Miller v. Fasse, 1 Bailey Eq. 187.

(3) This rule has been adopted by the Supreme Court of the United States. Rule 37th of the Equity Rules, January Term, 1842. Story Eq. Pl. § 442, note.

Where coupled with an Answer.

plea is for many purposes considered as a short answer, possibly the Order may be considered as extending to the case of a joint demurrer and plea (q).

Nature of answer.

When it may

be excepted to.

For information as to the nature of the answer to be put in to those parts of the bill to which the defendant does not demur, the reader is referred to the Chapter on Answers. It is, however, to be observed here, that if the plaintiff conceives that the defendant has not sufficiently answered that portion of his bill, he may except to the answer, but he must not do so before the demurrer has been argued (r), otherwise he will admit the demurrer to be good (s). It is said, however, that if the demurrer is to the relief only, and not to any part of the discovery, the plaintiff may take exceptions to the answer before the demurrer is ar-

gued (t). A demurrer must be signed by counsel (1), but is put in with-Demurrer must be signed out oath, as it asserts no fact, and relies merely upon matter apby counsel. parent upon the face of the bill (u).

### SECTION IV.

## Of Filing, Setting down, and Hearing Demorrers.

How filed.

AFTER the draft of the demurrer has been settled and signed, it is to be fairly engrossed on parchment and carried to the Record and Writ Clerk to be filed.

It seems to be necessary that a separate demurrer, by a married woman, should have an order to warrant it; such a demurrer ought not, therefore, to be filed till an order to that effect has been procured (x).

Within what time a defendant may demur alone.

By the 16th Order of May, 1845, Art. 10, "A defendant may demur alone to any bill within twelve days after his appearance thereto, but not afterwards." This rule has not made any alteration in the practice which has prevailed since the publication of the Orders of 1833. By the original practice of the Court, a de-

(q) Jones v. Earl of Strafford, 3 P. Wms. 81. Mills, 13 Ves. 85. (t) Lord Red. 317, cited 3 P. Wms. 327, n. s.

(r) London Assurance Company v. East India Company, 3 P. Wms. 326. (u) Lord Red. 208. (z) Baron v. Grillard, 3 V. & B.

(s) Lord Red. 317; vide Boyd v. 265.

⁽¹⁾ Smith Ch. Pr. (2nd Am. ed.) 209; Story Eq. Pl. § 461.

fendant had only eight days from the date of his appearance to answer, and at the expiration of this time he was obliged to obtain an order for time, or he was liable to be attached. It was a condition of the order for time that the defendant should not demur alone to the bill, so that he then had only eight days within which he might so demur.

Of Filing.

It appears that, under the old practice, the Court would, in cer- Under the eld tain special cases, allow a defendant to put in a demurrer to the whole bill, even after he had obtained an order for time (y): no case of an application for such a purpose appears to have occurred under the Orders of 1833; it is presumed, however, that if any motion to that effect were now to be made, it would be successful; provided the circumstances were such as would have induced the Court to accede to it under the old system. What these circumstances are may be collected from what was said by Sir T. Plumer, V. C., in Bruce v. Allen (z). "In a special case, the Court will grant such a motion as this. By a special case, I mean some peculiar circumstance, as surprise; it not being sufficient, in such a case as this, to show, on the the merits of the case, that a demurrer was proper; for it appeared proper in the cases cited (a), though in them the motion was denied" (1).

According to the present practice of the Court, therefore, if a If after the defendant, after the expiration of twelve days from the time of his defendant appearance, puts in a demurter to the whole bill without a special demurs alone, order for that purpose, he is guilty of an irregularity, and the plain-be taken off the tiff may, upon application to the Court by motion, obtain an order file. to take the demurrer off the file and oblige the defendant to pay the costs of his proceeding (b).

In fact, by the above order, a defendant, after the twelve days which he is thereby allowed for putting in a demurrer, is placed in exactly the same situation that he would have been in under the old practice, had he obtained an order for "time to plead. answer, and demur, not demurring alone." In order, therefore, to understand what will be a defendant's situation with regard to

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⁽y) Bruce v. Allen, 1 Madd. 556; and see Smith v. Webster, 3 M. & C. 246, as to the jurisdiction of the Court to dispense with the general

⁽a) Taylor v. Milner, 10 Ves. 444; Dolder v. Lord Huntingfield, 11 Ves.

⁽b) Dyson v. Benson, Coop. Rep. 110.

⁽z) Ubi supra.

^{(1) 1} Smith Ch. Pr. (2nd Am. ed.) 207, 208; Burrall v. Raineteaux, 2 Paige, 331; 2 Madd. Ch. Pr. (4th Am. ed.) 264, 265; Kenrick v. Clayton, 2 Bro. C. C. (Perkins's ed.) 214, note (1), and cases cited.

Of Filing.

demurring after the expiration of the twelve days from his appearance, it will be necessary to see what, under the old practice of the Court, would have been considered as a compliance with the terms of the order "to plead, answer, or demur, not demurring alone."

What is sufficient compliance with condition not to demur alone.

Lord Redesdale says, that the condition that the defendant shall not demur alone, ought not to be considered literally (c); and that it has been formerly said, that the Court will not incline to discharge a demurrer, if the defendant denies combination only where he cannot answer further without overruling his demurrer However, the modern practice has been according to the original strictness of the rule, and it has been considered that where a defendant has been under an order which obliged him to plead, answer, or demur, not demurring alone, he must, if he is advised to demur, annex to his demurrer a plea or answer to some part of the bill (e) (1). It has, however, been determined that a mere denial of combination does not amount to a compliance with the order, and therefore a demurrer, accompanied by such an answer, has, upon motion, been taken off the file (f). With respect to the extent of the answer which will be considered as a sufficient compliance with the order not to demur alone, it may be observed, that in Tomkin v. Lethbridge (g), which was a bill for a discovery, the answer gave no information, but simply stated the death of a person, and denied combination, and Lord Eldon said, that according to the practice of the Court, if the defendant had been under the order not to demur alone, the addition of this short answer would have saved the terms of that order (A).

Demurrer and answer filed after attachment taken off the file.

It has been before stated, that if a defendant omits to put in his demurrer, or to answer within the time limited by the order, and an attachment is, in consequence, issued against him for want of an answer, a demurrer, even though coupled with an answer, will be irregular, and that in such case the proper course is to move that the demurrer and answer be taken off the file, and not that the demurrer be overruled (i).

(c) Lord Red. 210. (d) Ibid. and vide Done v. Peacock, 3 Atk. 726.

(g) 9 Ves. 179 | Sumner's ed.

notes].
(h) Vide etiam, Baker v. Mellish.
11 Ves. 73.

⁽e) Lord Red. 209. (f) Ibid (f) Ibid.; Stephenton v. Gardiner, 2 P. Wms. 286; Lee v. Pascoe, 1 Bro. C. C. 78 [Perkins's ed. note (1), and cases cited]; Kenrick v. Clayton, 2 Bro. C. C. 214; 2 Dick. 685, S. C.; Lansdown v. Elderton, 8 Ves. 526 [Sumner's ed. Mr. Hovenden's

note (1)]; Tomkin v. Lethbridge, 9 Ves. 178; Taylor v. Milner, 10 Ves. 446; Wetherhead v. Blackburn, 2 V. & B. 123.

⁽i) Ibid. Curson v. De la Zouck, I Swanst, 193.

⁽¹⁾ Story Eq. Pl. § 461, 462.

It is right here to advert to the distinction in practice between taking a demurrer and answer off the file, and simply overruling Difference bethe demurrer, thereby leaving the answer on the file. The former tween taking course appears to be the one adopted in all cases where there has off the file and been an irregularity in the filing of the demurrer, whether it be accompanied by an answer or not (k). The course of overruling the demurrer is adopted, wherever the demurrer has been properly filed, but the Court is of opinion that it is insufficient, or that it has been overruled by the answer; a demurrer will also be overruled where a defendant, after filing it, omits to conform to some of the rules of practice, with regard to setting it down, &c., which will be presently pointed out. This distinction affords a solution to the difficulty, which appears to have divided the Court of Exchequer in Atkinson v. Hanway (1), in which, as has been stated, the defendant had answered the original bill, but afterwards, upon its being amended, had demurred to the whole record, and the Court were unanimous in the opinion, that the defendant should have demurred only to that part of the bill which had been introduced by amendment, but were divided upon the question, whether the defendant should have moved to take the demurrer off the file, or should have set it down, and have had it overruled; which last course, there can, after the decision in Curzon v. De la Zouch, above referred to, be little doubt should have been the one resorted to; it being clear that the demurrer was properly filed in point of practice, though, being too extensive in covering that part of the bill which had been previously answered, it was liable to be overruled.

It may be noticed, with reference to this part of the subject, that where a demurrer has been taken off the file for irregularity. it ceases to be a record of the Court, and the defendant may, therefore, put in a plea, or another demurrer, (if his time for demurring has not expired,) as if no demurrer had been filed (m).

It is to be observed, however, that the demurrer is not taken In what manoff the file by the mere pronouncing of the order, but that it must ner taken off actually be withdrawn from the file. To effect this, the order when drawn up should be carried to the Record and Writ Clerk, who will withdraw the demurrer annexing the order to it (n).

It has hitherto been necessary, after filing a demurrer, to enter Entering deit with the Registrar, but now, by the 44th Order of May, 1845, murrer no longer neces-"a demurrer or plea need not be entered with the Registrar; but sary.

⁽k) Ibid. (l) 1 Cox, 360.

⁽m) Cust v. Boode, 1 S. & S. 21.

⁽n) Ibid.

When taken off the file.

Notice of filing.

upon the filing thereof by a defendant, either party is at liberty to set the same down for argument immediately."

The 23rd Order of October, 1842, provides, that where any solicitor or party files a demurrer, he shall, on the same day, give notice thereof to the solicitor of the adverse party, or to the adverse party himself, if he acts in person.

In what cases plaintiff may amend after demurrer filed.

Costs.

After demurrer set down.

If the defendant put in a demurrer which it is apprehended will hold good, the best way for the plaintiff, if he intends to discontinue the suit, is to move and obtain an order to dismiss his bill, with costs to be taxed by a Master, which costs being paid to the defendant, there is an end of the suit (o). But if the plaintiff thinks fit he may apply to the Court, either by motion or petition, to amend his bill, on payment of twenty shillings cost (p); this, however, must be done before the demurrer is set down to be argued, otherwise the plaintiff must pay the defendant the costs of the demurrer, and twenty shillings beside, before he can amend These costs used to be fixed at five pounds, and where, after a demurrer had been set down, plaintiff submitted, and obtained the ordinary order to amend on payment of twenty shillings, the Court, upon motion by the defendant, ordered him to pay the additional five pounds (r).

Amendment of ted after demurrer called on; unless in a clear case of oversight.

If a plaintiff wishes to amend his bill after a demurrer has been bill not permit- set down, he must obtain leave to do so before it is called on for argument; otherwise he will not be permitted to do so. Holmes v. Waring (s), however, the Court of Exchequer, in a clear case of omission, by oversight, made an order that the plaintiff might have liberty to amend, after the demurrer had been opened, but on making the order, Lord Chief Baron Richards required that it should be entered as a part of the order that the permission had been given, upon the Court being informed by counsel that the omission in the bill had been the consequence of a mere mistake. The plaintiff was of course ordered to pay the costs of the demurrer.

(o) 1 Harr. 216.

(p) Warburton v. London and Blackwall Railway Co. 2 Beav. 253;

(q) 1 Har. 216. (r) 1 Har. 61, 1808; Anon. 9 Ves. 221. The 31st Order of 1828 provided for the payment by the plaintiff of taxed costs, both of the demurrer and of the suit, upon the allowance of the demurrer; and this Order seems to have been extended to a case where the plaintiff submitted without argu-

ment, Jones v. Wattier, 4 Sim. 128. The Order is now discharged, and the 45th Order of May, 1845, which is substitued in its place, is confined to the allowance of a demurrer upon argument. It is doubtful, therefore, whether the old practice under which the 5l. was payable, is not now applicable when the plaintiff submits to a demurrer after it is set down and without argument. See post, page

(s) 8 Price, 604.

After a demurrer has been set down, the defendant may, by motion, obtain an order to withdraw it on payment of costs, to be taxed by a Master (t).

Of setting down. How with-

By the 45th Order of May, 1845, where a demurrer to the whole drawn. or part of a bill is allowed upon argument, the plaintiff, unless the allowance of Court orders to the contrary, is to pay to the demurring party the demurrer. costs of the demurrer; and if the demurrer be to the whole bill, the costs of the suit also.

By the 46th of these Orders (u), where a demurrer to the Consequence whole bill is not set down for argument, within twelve days after down demurthe filing thereof, and the plaintiff does not within such twelve rer to whole days serve an order for leave to amend the bill, the demurrer is bill. to be held sufficient to the same extent, and for the same purposes, and the plaintiff is to pay to the demurring party the same costs, as in the case of a demurrer to the whole bill, allowed upon argu-

By the 47th Order (w), where a demurrer to a part of a bill is To part of the not set down for argument within three weeks after the filing thereof, and the plaintiff does not within such three weeks, serve an order for leave to amend the bill, the demurrer is to be held sufficient to the same extent, and for the same purposes, and the plaintiff is to pay to the demurring party the same costs, as in the case of a demurrer to part of a bill allowed upon argument.

In computing the period allowed for setting down a demurrer, the vacations are not included (x).

As by these Orders, in the event of a demurrer not being set down for argument within a limited period, the defendant derives the same benefit as by its allowance, the duty is cast upon the plaintiff, if he is desirous that it should be submitted to the judgment of the Court, of having it set down for argument. This is done, by presenting a petition for an order to set down the demurrer.

The petition which prays that a day may be appointed for arguing the demurrer, must state the Judge to whose Court the bill or information is attached (y). No deposit is requisite. When the petition is answered, it must be left at the Registrar's office, for the order to be drawn up and passed; and when it has been passed and entered, it must be served upon the solicitor for the opposite Order to set it party (z). The order directs the demurrer to be set down next down.

⁽t) Downes v. E. I. Comp. 6 Ves. 586.

⁽u) See also Order 16, Art. 17.

⁽a) See also Order 16, Art. 18.

⁽z) 14th Order, May, 1845, Art.

^{31,} and see page 472.
(y) 5th Order, May, 1837, and Order of 11th November, 1841.

⁽z) Hind. 213.

Of many DITT. Service al

after the pleas and demurrers already appointed, but that the same ze to be set down in four days, or else the order is to be of no efzect c. The service of this order upon the solicitor for the opposite party, must take place at least two days before the day appouted for hearing (b).

By the general Order of the Court, no demurrer is to be set was for hearing on any particular day, except the order for setthe course the same be brought to the Registrar to be entered at least two days before the day appointed for hearing such demurrer 'ch and it is to be observed, that in general the Court cannot errect a demarter to be heard at an earlier day than the one appercent although it may advance it to the head of the paper on रकेंद्र देश . दी

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In cases, however, of balls for injunction, as no injunction can issue penimg a demurrer (e), the Court will, upon application, where the matter is pressing, order the demarter to be urged immediately: but it is not a matter of course to do so, and where there had been considerable delay in filing the bill, which was unaccording the Court refused to advance the demurrer (f).

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Although it is usually incumbent upon the plaintiff to set down a demarrer for argument, when he does not submit to it; yet we have seen, that by the terms of the 44th of the Orders of May, 1845, the defendant is also at liberty to set it down, and there may be cases in which it will be of consequence for him so to do; thus when an injunction has been obtained for want of answer, within eight days after appearance, under the 16th of the Orders of May, 1845, Art. 11; and a demurrer has been subsequently aied before the expiration of twelve days from the appearance; the defendant may be desirous of bringing the demurrer on for argument immediately.

In injunction cases, however, care should be taken to file the demurrer before eight days have expired.

After a demurrer has been set down, the defendant may by motion, obtain an order to withdraw it on payment of costs, to be taxed by a Master (g).

When a demurrer is called on for hearing, and the defendant Hearing of demurrer. omits to appear, the demurrer will be struck out of the paper, unless the plaintiff, being the party who has set down the demurrer, can

- (a) Hand, 18.
- (4) 1 Newl. 115.
- (c) Beames' Orders, 190.
- (d) Anon. 1 Mad. 157.
- (c) Cousens v. Smith, 13 Ves. 164. (f) Jones v. Taylor, 2 Mad. 181. (g) Downes v. E. I. Comp. 6 Ves.

produce an affidavit of service upon the defendant or solicitor of Of Hearing. the order to set it down. If the plaintiff can produce such an af- Where defenfidavit, the demurrer is not necessarily overruled, but he must be dant omits to heard in support of the bill, the affidavit of service not authoriz-appear. ing the Court, in the absence of the defendant, to overrule the demurrer, but to hear the plaintiff (h). When the defendant appears, Where plainand the plaintiff does not, the demurrer will also be struck out of tiff omits to the paper, unless the defendant can produce an affidavit of service upon himself of the order for setting down the demurrer; or unless, in the event of the defendant having himself set down the demurrer, he can produce an affidavit of service by him, upon the plaintiff or his solicitor. On the production of such an affidavit in either case, the defendant may have the demurrer allowed with costs (i).

Where a demurrer has been struck out of the paper a fresh order must be obtained for setting it down, which may be had either upon petition or motion (k).

The usual course of proceeding when the demurrer comes on Manner of for hearing, and all parties appear, is generally for the junior coun-hearing. sel for the party setting the demurrer down for argument to open the pleadings, after which the counsel in support of the demurrer are heard, and next the plaintiff's counsel, and then the leading counsel for the demurring party replies. In hearing a demurrer, the argument is strictly confined to the case appearing upon the record, and for the purposes of the argument, the matters of fact stated in the bill are admitted to be true (1).

After a demurrer has been called on for hearing, the Court will After demurnot in general allow the plaintiff, at his own suggestion, to amend rer called on, his bill, unless by consent of the defendant, though, as we have bill cannot in seen, such a proceeding was permitted by the Court of Exchequer amended. in a cause where a mistake had been made in the bill by mere inadvertence or oversight, upon payment of the costs (m).

Where it has appeared upon the hearing of a demurrer to the Amendment of whole bill, that the defendant is entitled to demur to some part demurrer peronly, the Court has permitted the demurrer to be amended, so as mitted at the to confine it to the parts to which the defendant has a right to demur (n); in such cases, however, the most usual course is to overrule the demurrer, and to give the defendant leave to put in a new demarrer to such part of the bill as he may be advised.

(h) Penfold v. Ramsbottom, 1 cerning facts not averred by the bill,

Swanst. 552.

(i) Jennings v. Pearce, 1 Ves. J.

(k) Tolson v. Lord Fitzwilliam, 4 Mad. 403; as to the presumption con-

see Foss v. Harbottle, 2 Hare, 503.

⁽¹⁾ See ante, page 600. (m) Holmes v. Waring, ubi supra. (n) Glegg v. Legh, 4 Mad. 193.

Of Hearing. Demurrer ore tenus,

confined to cases where there is a demurrer on record.

It has been before stated, that when a demurrer comes on for argument, the plaintiff may assign a new cause of demurrer, ore tenus, different from that stated on the record, and the rules which regulate this proceeding have been pointed out (o); the consequence of this mode of demurring, so far as regards the costs, will be discussed in a future section. It is, however, to be observed here, that a defendant cannot demur, ore tenus, unless there is a demurrer on the record; and that, upon this ground, where a defendant had pleaded, and, upon the plea being overruled, offered to demur ore tenus, for want of parties, he was not permitted to do so (p) (1).

But cannot be ground.

A defendant also cannot demur ore tenus for the same cause that upon the same has been expressed in the demurrer, on record, and overruled (q), nor can he after a demurrer to the whole bill demur ore texus as to part (r).

> It seems, however, that after a demurrer to part of the bill has been overruled, the defendant may demur ore tenus to the same part (s).

### SECTION V.

# Of the Effect of allowing Demurrers.

Whether. amendment of bill permitted.

STRICTLY speaking, upon a demurrer to the whole bill being allowed, the bill is out of Court, and no subsequent proceeding can be taken in the cause (t). There are cases, however, in which the Court has afterwards permitted an amendment of the bill to be made (u), and it seems that, even after a bill has been dismissed by order, it has been considered in the discretion of the Court to set the case on foot again (x). The instances in which this has been done, however, are very rare: the only cases, indeed, that occur in the books, in which an amendment of the bill has been permitted after a demurrer, are those of Lord Coningsby v. Sir

(o) See page 658. (p) Durdant v. Redman, 1 Vern. 78; Hook v. Dorman 2 S. & S. 227.

(g) Bowman v. Lygon, 1 Anst. 1.
 (r) Vide Shepherd v. Lloyd, 2 Y.

(s) Crouch v. Hicken, 1 Keen, 385; ante, 658.

(t) Smith v. Barnes, 1 Dick. 67; Watkins v. Bush, 2 Dick. 701.

(u) Lord Coningsby v. Sir J. Jekyll, 2 P. Wms. 300; Lloyd v. Loaring, 6 Ves. 779.

(x) Per Lord Eldon, in Baker v. Mellish, 11 Vos. 68, 72.

⁽¹⁾ Ante, 658, note; Story Eq. Pl. § 464.

Joseph Jekyll, and Lloyd v. Loaring above referred to. With res. To the whole pect to the first of these cases, being a decision of the Duchy Court only, it can scarcely be considered of sufficient authority to overrule the decisions of the Court of Chancery, which have been before noticed; and, with respect to the latter, it is to be observed, that the motion upon which it was founded was made in consequence of the intimation given by Lord Eldon, at the original argument of the demurrer, that he would, if asked, give the plaintiffs leave to amend; so that, in fact, the order can only be considered as part of the order made at the hearing of the demurrer. It may, therefore, be considered as a positive rule of the Court, liable to scarcely any exception, that, after a demurrer has been allowed, the case is entirely out of Court. The consequence of this is, Amendment of bill after dethat any order made subsequently in the cause will be irregular; murrer allowand in Watkins v. Bush (y), Lord Kenyon, M. R., said that when, ed irregular. after a demurrer has been allowed, the plaintiff amended his bill, the course the defendant should have taken, (if any were necessary,) should have been to apply to discharge the order to amend, for irregularity. It is to be noticed that, to the above case, Mr. Dickens has added a query: - " As the cause is out of Court, how could he apply?" and suggests whether it would not be more advisable for the defendant not to pay the least regard to any step the plaintiff might take, and leave it to the plaintiff to justify any unwarrantable measure he might adopt to compel the defendant to pay obedience; and there can be no doubt that the defendant might, if he pleased, act in conformity with that suggestion. Still a party might be unwilling to expose himself to the consequences of resisting the process of the Court, which might issue upon the amended bill, even though he were certain that he might ultimately set it aside, and compel the plaintiff to pay him his costs; and it would be very adverse to the principles upon which the Court usually acts, if they were to deny a defendant, so circumstanced, the opportunity of taking other measures to get rid of the irregular proceedings.

It is to be observed, that in Watkins v. Bush (z), the defendant But if defendid not apply by motion to discharge the order to amend, but he dant demurs to the amended took the course of demurring to the amended bill, by which the bill he waives Master of the Rolls held he had waived the irregularity, and the the irregularity. demurrer was overruled.

But although, after a demurrer has been allowed, the bill is out of Court, and no order can be subsequently made in the cause, the

Bill.

Liberty to amend the bill when given.

To the whole Court will in some cases, where it sees that the defect pointed out by the demurrer can be remedied by amendment, and substantial justice requires it, make a special order, at the hearing of the demurrer, adapted to the circumstances of the case (a). where the demurrer is allowed on the ground of want of parties, the Court generally gives the plaintiff leave to amend his bill, by adding parties as he may be advised (b) (1). According to Lord Cottenham, "It is not usual, upon allowing a general demurrer, to give leave to amend; but it may be done. It is in the discretion of the Court so to do (c)."

In case of demurrer for want of par-

Order to

amend not of course.

In the case of Tyler v. Bell (d), Lord Langdale, M. R., upon allowing a demurrer for want of parties, refused to give the plaintiff leave to amend his bill, by adding the necessary parties; and Lord Cottenham dismissed an appeal from this order, saving, that "when it is said that a bill is never dismissed for want of parties, nothing more is meant, than that a plaintiff, who would be entitled to relief if proper parties were before the Court, shall not have his bill dismissed for want of them, but shall have an opportunity afforded of bringing them before the Court: but if, at the hearing, the Court sees that the plaintiff can have no relief under any circumstances, is it bound to let the cause stand over, in order that the plaintiff may add parties to so hopeless a record? There must be a discretion in the Court, and the cases of Lowe v. Fairlie (e), and Lewis v. Gentle (f), prove that such discretion exists. think that the Master of the Rolls properly in this case refused permission to amend. I am of opinion that this bill is clearly defective for want of parties; and that the case stated is such as to make it impossible to obtain any relief upon this bill against the defendants to the bill, and that the plaintiff ought, therefore, not to have leave to amend."

Leave to amend generally sometimes given.

It frequently happens, that when a demurrer for want of parties is allowed, the Court, instead of confining its permission to amend to a mere addition of parties, will, upon the plaintiff's application, give the plaintiff general leave to make such amendments as he may be advised (g).

When, upon the argument of a demurrer, leave is given to the

⁽a) Ante, p. 631. (b) Ante, p. 331. (c) 4 M. & C. 558; and see John-

stone v. Anthony, 2 Mol. 373. (d) 2 M. & C. 89. Sim. 585; ante, p. 336.

⁽e) 2 Mad. 101. (f) Cited 2 M. & C. 111. (g) Newton v. Lord Egmont, 4

⁽¹⁾ McElwain v. Willis, 3 Paige, 505.

plaintiff to amend his bill, the defendant, if he is desirous of ap- To the whole pealing from this order, ought to apply to stay the amendment, until the appeal has been disposed of; or, at any rate, he ought When defennot to act upon the order giving the plaintiff leave to amend; as dant is defor instance, by demurring to the amended bill. By so doing, he pealing. will prevent the Court above from allowing his appeal, upon the principle, that giving leave to amend is not founded upon any strict rule of practice, but upon the discretion of the judge; and therefore, the Lord Chancellor will not interfere when the parties have acted upon the discretion exercised by the Court below, and thereby rendered it impossible that they should be placed in the condition in which they were before they so acted (h).

It may be observed, that the amendment of a bill, in pursuance Effect upon of an order made upon the hearing of a demurrer, if made before ment of bill. the defendant answers, will not preclude a plaintiff from making one amendment after answer, upon motion of course (i).

Although the effect of allowing a demurrer to the whole bill is Where a par-Although the enect of allowing a demurrer to put the cause out of Court, the allowance of a partial demurallowed, plainrer is not attended with such a consequence. The bill, or that tiff may propart of it which was not covered by the demurrer, still remains ceed in the cause. in Court, and the plaintiff may obtain an order to amend, or to refer the answer upon exceptions, or adopt any other proceedings in the cause, in the same manner that he might have done had there been no demurrer (k).

A demurrer being frequently on matter of form is not, in gene- When deral, a bar to a new bill; but if the Court, on demurrer, has clear-murrer not a bar to a new ly decided upon the merits of the question between the parties, bill. the decision may be pleaded in another suit (1).

We have before seen that where a demurrer to the whole or Costs. part of a bill is allowed upon argument, the plaintiff, unless the Court orders to the contrary, is to pay to the demurring party the costs of the demurrer, and if the demurrer be to the whole bill, the costs of the suit also (m). This order does not seem, so far as it relates to demurrers, to have made any difference in the practice that has prevailed since the Orders of 1828 (n).

Previously to that time the practice was governed by two orders, the result of which was, that on the allowance of the demurrer,

- (h) Wellesley v. Wellesley, 4 M. & C. 554.
- (i) Pesheller v. Hammett, 3 Sim. 389; and 66th Order, May, 1845.
- (k) Lord Red. 215.
- (l) Ibid.
- (m) 45th Order, May, 1845. (n) 31st Order of 1828, discharged.

the plaintiff paid to the defendant 51. costs. and in special cases

down.

Costs.

When not set

such other costs as the Court thought fit to award (o).

We have also seen, that, where either a demurrer to the whole bill or to part of a bill is filed, if the plaintiff does not, within a short limited period, in each case serve an order to amend the bill, or set down the demurrer for argument, he will have to pay the same costs as upon the allowance of the demurrer on argument (p).

When the plaintiff, after the filing of a demurrer, serves an order for the amendment of his bill before the demurrer has been set down for argument, it seems that he is only bound to pay 20s. costs (p).

If the demurrer has been set down, and the plaintiff amends, submitting thereto, there does not seem to be any order precisely fixing the costs which he has to pay, but upon special application by the defendant, probably he might be ordered to pay additional costs (q).

When demurrer ore tenus allowed.

With respect to the costs demurring ore tenus, the old rule of the Court was, that if any cause of demurrer should arise more than was particularly alleged, yet the defendant should pay the ordinary costs of overruling a demurrer, if those cases which were particularly alleged were disallowed, although the bill, in respect of that particular so newly alleged, shall be dismissed by the Court (r).

In Tourton v. Flower (s), however, the demurrer appears to have been allowed without costs, "because the demarrer on record was an ill one, and the plaintiffs were not to blame to argue it;" but then it was said that neither ought the plaintiffs to have costs of a bill appearing to be ill, and to want parties; and, in a note by the reporter, it is added, that what is said in Durdant v. Redman (t), that costs ought to be paid for a new demurrer, insisted on at the Bar, ore tenus, is not now the practice; and in this last statement most of the books of practice agree (u). Lord Eldon, however (x), stated the practice to be, that "If a defendant cannot sustain the demurrer on the record, he is entitled todemur ere

(o) Beames' Ord. 320, and 456. (p) Ante, page 665. (p) Hearn v. Way, 6 Beav. 368; Warburton v. The Blackwall Rail-

way Company, 2 Beav. 255.

(q) Hearn v. Way, supra; Anon.

9 Ves. 221; ante, page 664, n.

(r) Durdant v. Redman, 1 Vern.

78; Beames, 174.

(s) 3 P. Wms. 371; vide etiam,

Broderip v. Phillips, 1 Vern. 78, n.; Ed. Raithby. Wood v. Thompson, 2 Dick. 510.

(t) 1 Vern. 79. (u) Vide Prac. Reg. 163; Curs. Canc. 906; 1 Prax. Alex. 16, 486; Beames' Orders, 174, n. 29.

(x) Attorney-general v. Brown, l Swanst, 265, 288.

tenus; but, availing himself of that right, he must pay the costs of the demurrer on the record;" and this appears to be the present rule (v).

Costs.

In general, however, where the demurrer, ore tenus, has been allowed on the ground of want of parties, and the Court has given the plaintiff leave to amend his bill by adding parties, the practice the plaintiff leave to amend his our by adding parties, and product where leave has been not to compel him to pay the costs of the demurrer (z); Where leave to amend by and where in such cases the plaintiff, instead of taking leave to adding parties. amend by adding parties, has asked for and obtained leave to Where leave amend his bill generally, the course of the Court appears to be to to amend generally. make him liable to the costs of the demurrer (a). The rule, however, with respect to costs upon such occasions, is not imperative, and the Court has a discretionary power; and, therefore, where the V. C. of England upon allowing a demurrer ore tenus, for want of parties, ordered the defendant to pay the costs of the demurrer on the record, although he had given the plaintiff leave to amend his bill generally, Lord Cottenham refused to make any alteration in the order; his Lordship being of opinion, that as the 32nd Order of 1828 (b) was imperative, unless the Court thought fit to make an order to the contrary, and as the Vice-Chancellor had not thought fit to make use of the discretion given him by the Order, he (the Lord Chancellor) could not interfere (c).

Where a demurrer to a bill is allowed, and afterwards the order When order allowing it is, upon re-argument, reversed, the defendant, if he murrer rehas received the costs from the plaintiff, will be ordered to refund versed. them, upon application by the plaintiff (d); and so if a demurrer has been overruled, and the order is reversed upon re-hearing,

(y) Mortimer v. Fraser, 2 M. & C. 173.

(z) Newton v. Lord Egmont, 4 Sim. 585; and as to the form of the order in such a case, see Attorneyreneral v. Corporation of Poole, 4 M.

& C. 35. (a) Ibid. It is to be observed, that this practice is not inconsistent with the general rule above laid down, that a defendant demurring ore tenus must pay the costs on the record. If the plaintiff on such occasion, instead of submitting to have his bill dismissed, as must be the case upon the allowance of the demurrer, unless it is accompanied with a permission to amend by adding parties, takes the benefit of such permission, it is but fair that he should lose his right to the costs of a proceeding by which in fact he is benefited; for there can be

no doubt, that it is in general an advantage to a plaintiff to have a defect of that nature pointed out in an early stage of the cause, so that he may remedy it, before it comes on for hearing. And so if, after a demurrer for want of parties allowed, the plaintiff asks for and obtains leave to amend further than by adding par-ties, it is only right that he should pay the costs of a proceeding which has had the effect of directing his attention to the defeats in his record, and has given him an opportunity of remedying them without his incurring the expenses of a separate application for that purpose.

(b) See post, page 674.
(c) Mortimer v. Fraser, ubi sup.
(d) Oats v. Chapman, 1 Ves. 542; 2 Ves. 100, S. C.; 1 Dick. 148, S. C. To the whole the plaintiff, if he has received costs from the defendant, must Bill, refund them.

## SECTION VI.

## Of the Effect of Overruling Demurrers.

A DEMURRER being a mute thing, cannot, like a plea, be ordered to stand for an answer (e).

After demurrer to the whole bill overruled, no rer allowed. unless it be

After a demurrer to the whole bill has been overruled, a second demurrer to the same extent cannot be allowed, for it would be in effect to rehear the case on the first demurrer; as, on argument second demur- of a demurrer, any cause of demurrer, though not shown in the demurrer as filed, may be alleged at the bar, and if good will supless extended. port the demurrer (f). A demurrer, however, of a less extensive nature, may, in some cases, be put in; and in Devonsher v. Newenham (g), which has already been repeatedly referred to, where the substance of a demurrer was good, but was informally pleaded, so that the demurrer was overruled, Lord Redesdale gave the defendant liberty to take it off the file, and to demur again, as he should be advised, on payment of costs. In Glegg v. Legh (k), where a demurrer was put in to the whole bill, the Court allowed the defendant to amend it so as to make it less extensive.

Defendant permitted to amend his demurrer.

And in Thorpe v. Macauley (i), where a bill was filed for a discovery and for a commission to examine witnesses abroad, to which a demurrer was put in, the Court being of opinion that the plaintiff was entitled to the commission, although, under the circumstances, the defendant could not be compelled to make the discovery required, permitted the defendant to amend his demurrer, and to limit it only to the discovery.

But no second demurrer without leave.

A second demurrer, however, though less extended than the first, cannot, after the first demurrer has been overruled, be put in without leave of the Court; but the case is different where the first has been taken off the file for irregularity (k). This leave is generally granted, upon hearing the first demurrer, but it has been permitted upon a subsequent application by motion.

But although a defendant cannot, after the Court has overruled

⁽e) Anon. 3 Atk. 530.

⁽f) Lord Red. 217. (g) 2 Sch. & Lef. 199.

⁽h) 4 Mad. 207. i) 5 Mad. 218.

⁽k) Ante, p. 97.

his demurrer to the whole bill, again avail himself of the same To the whole method of defence, yet, as it sometimes happens that a bill which. if all the parts of the case were disclosed, would be open to a demurrer, is so artfully drawn as to avoid showing upon the face of it any ground for demurring, the defendant may in such case make the same defence by plea, stating the facts which are necessary to bring the case truly before the Court (1). As it is, however, the rule of the Court not to allow two dilatories without leave, or. in other words, as the defendant is only permitted to delay his answer by plea or demurrer, without leave of the Court, once, he must, previously to filing his plea, obtain the leave of the Court to do so, otherwise his plea may be taken off the file (m).

From what has been said, it results, that, after a demurrer to If no leave dethe whole bill has been overruled, the defendant, unless he obtains fendant must leave to put in a demurrer of a less extended nature, or a plea either to the whole bill or to some part of it, must put in a full answer. If he does not do so within the ordinary time allowed by the Court, after appearance, for putting in an answer, the ordinary process of contempt issues to compel an answer, as in other He may, however, if the time for answering be expired before his demurrer has been decided upon, obtain an order for further time to put in his answer. And it seems that the defen-Time for andant, at the time of the demurrer being overruled, is entitled to swering how obtained. apply to the Court for time to answer, and that the Court will, in order to protect him against an attachment, to which he might be liable, if he were to wait till he could obtain an order for time in the usual course, grant such time as it shall think proper (n). If a defendant omits to ask for time, and the demurrer is overruled, he may do so afterwards, but it must be by special application (o); he must, therefore, make his application to a Master, as directed by the 3 & 4 Will. IV. c. 94, s. 13, and not to the Court.

Where a demurrer is not to the whole bill, but is accompanied Where partial by an answer, the plaintiff, after the demurrer is overruled, if he demurrer overruled, de wishes for a further answer, must except to the answer for insuffi-fendant need ciency (1); and, therefore, the defendant need not put in any an-not answer further till the swer till after the plaintiff has taken exceptions to the answer plaintiff has

excepted.

⁽l) Lord Red. 216. (n) Trim v. Baker, 1 T. & R. 253. (m) Rowley v. Eccles, 1 S. & S. 512. (o) Ibid.

⁽¹⁾ See Kuypers v. Ref. Dutch Church, 6 Paige, 570.

To the whole already put in, and such exceptions have either been allowed or submitted to (p). We have seen before, that the plaintiff ought not to except to the answer till the demurrer has been decided upon (q). If after a decision overruling the demurrer he amends either generally or by adding parties, he will not thereby lose his right to except to the part of the bill which had been demurred to (r).

Injunction granted of course on overruling.

In an injunction suit, a common injunction will be granted of course upon a demurrer to the bill being overruled (s); but it can only issue upon motion; and it was formerly held, that such motion must be made according to the usual course of the Court, that is, on any day in term time, or on a seal day out of term, so that, where a demurrer was overruled upon hearing out of term, the plaintiff had to wait until the next seal, before he could obtain his injunction (t). The practice, however, now is, that the common injunction may be moved for on any day of the Court's sitting, whether in term or out of term.

Costs.

Plaintiff may file his traversing note.

By the 32nd of the Orders of 1828, it is ordered, that upon the overruling of any plea or demurrer, the defendant or defendants shall pay to the plaintiff or plaintiffs the taxed costs occasioned thereby, unless the Court shall make other order to the contrary. Moreover we have before seen, that by the 55th Order of May, 1845, "Where a demurrer or plea to the whole bill is overruled, the plaintiff, if he does not require an answer, may immediately file his traversing note in manner directed by Orders 52 and 53 (a), as the case may require, and with the same effect, unless the Court, upon overruling such demurrer or plea, gives time to the defendant to plead answer, or demur; and in such case if the defendant files no plea, answer, or demurrer within the time so allowed by the Court, the plaintiff, if he does not then require an answer, may, on the expiration of such time, file such note.

⁽p) Cotes v. Turner, Bunb. 123. 153; and Mad. & Geld. 299, n. a (t) Claughton v. Hadwell, Mad. & Geld. 299. (q) Ante, p. 658. Taylor v. Bailey, 3 M. & C. (u) See ante, page 566.

⁽s) Rashleigh v. Buller 1 Dick.

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